United States Court of Appeals for the Second Circuit



APPENDIX

74-1699 74-1706

In The

74-1661

United States Court of Appeals

For The Second Circuit

FABRIZIO & MARTIN INCORPORATED,

Plaintiff-Appellee-Appellant,

VS.

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE, MARS ASSOCIATES, INC., and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,

Defendants,

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE,

Defendants-Appellants-Appellees.

AETNA CASUALTY & SURETY CO., Additional Defendant on the Counterclaim of Defendant Board of Education,

Defendant-Appellee-Appellant

On Appeal from a Judgment of the United States District Court for the Southern District

APPENDIX

Volume II. pp. 271 540

LOUIS E. YAVNER

Attorney for Board of Education 60 East 42nd Street New York, New York 10017 (212) YU6-2255 PAGINATION AS IN ORIGINAL COPY

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1	MP Crane - cross 95
2	1964.
3	Q And that claim was for \$31,000; is that right?
4	A Right.
5	Q What does that claim mean, "Master Mechanic"?
6	A The hoisting engineers' union, who control shovel
7	operators, bulldozer operators, compressor operators, that
8	sort of people, decided some time shortly before this date
9	and by "shortly" I don't know if it was a few weeks or
10	a year or so decided that when I think in this the
11	number varied somewhat from district to district around the
12	country but when a certain number of their men were hand-
13	ling equipment on a job, there must be a master mechanic.
14	The master mechanic had no direct responsibility, and if I
15	may say so, it was strictly a featherbedding dream of the
16	union.
17	Q Be that as it may, it was a man required on the
18	-job?
19	A The union required any contractor who had more
20	than five, let's say, or four, whatever the number was,
21	operators from that union on the job, they had to have a
22	master mechanic.
23	Q And you interpreted
24	A This is Fabrizio's claim, that he should be paid an
25	increase in his contract because he was required to have a

1	MP Crane - cross 95[a]
2	master mechanic on the job.
3	Q Was a master mechanic provided for in the contract
4	documents?
5	A There would be no mention of it. It's up to Mr.
6	Fabrizio fo figure how much it's going to cost him to do the
7	excavation.
8	Q Now, when Mars-Normel took over the job, who paid
9	for the master mechanic at the job?
10	A I don't think we had one.
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were conserned, Pahrizio had to pay for the master mechanic,

but then with the completion contract the School Board all

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Crane - cross

of a sudden took up the payment of the cost; isn't that COFFECT?

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And isn't it also a fact that there is no mention of a master machanic or the conkractor's obligation to pay for a master muchanic in the contrast documents, original contract documents?

Contract.

MR. POWERS: I would like to have these minutes introduced as the next exhibit.

(Plaintiff Exhibit No. 4 was received in evidence.)

- O There is another item contained on your list, and that is the fill purchased off site. I believe you have that listed as Item 7 P?
 - Right.
- Do you know when fill was required by Fabrizio & Martin in connection with this project? Isn't it true they needed it throughout the project?
 - Generally, yes.
- Do you know whether it is a fact Fabrizio & Martin were required to use material contained in the borrow pit for fill?
 - He wasn't required to, but it was available to him. A
 - If he wasn't required to then he could have gone

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MD 4-3	Crane -	cross			
outside and bought some at	his own	expense;	that's	what	you
are saying, isn't it?					
A Yes.					

- O But without any extra charge to Pabrizio, the School Board and the architect were requiring him to use this borrow pit for fill?
 - A I can't agree with that we were requiring him to.
 - O Pardon?
- A I can't agree that we were requiring him to use fill from the pit.
- Q Without paying for it on his own. With that qualification, were you requiring him to?
- A No, we were not requiring him to. If he could get it from someplace else he was at liberty to go get it.
- Q If he could go out and find a good samaritan somewhere to furnish it?
- A Right. He was required to furnish fill under his contract.
- Q Just for purposes of the explaining it, for my edification and the Court's, what is a borrow pit?
- A A borrow pit is a trade t erm used to describe a hole from which a contractor exeavates fill material.
- O I refer you to Defendant's Exhibit 1, which is marked Plaintiff's Exhibit 1. As part of these documents is

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Crane - cross

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a document entitled change order dated March 17, 1964, and I ask you to review that document.

- Is there any provision in that change order with respect to the use of the borrow pit?
 - Yes.
- Does it, in effect, provide that the contractor will use the material from the borrow pit, provided it is satisfactory material?
 - Yes.
- And if it is not satisfactory under normal interpretation of that he would be entitled to a change order, would he not, for any material that he would have to go out and purchase?
 - Yes.
- And here Fabrizio & Martin submitted a claim for \$93,000 for material that it had to purchase off site over the course of the work and the School Board refused to pay him this sum, isn't that so?
 - That's correct.
- Despite the fact that it was provided for in that change order that where the material wasn't suitable he would be paid?
 - A It was our position that the material was suitable.
 - Did there not come a time when you finally did, the

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MD 4-5

| -- '

School Board and the architect finally did relent and permit or issue a change order for purchasing a fill off the site?

Crane - cross

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A Yes.

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O Because the borrow pit was unsatisfactory?

•

A No, because it was too difficult at that time of the year to get material out of the borrow pit.

^

Q And that's the only reason?

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A Yes.

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Q What about the completion contract to Mars and Normel? Was Mars and Normel required to use the borrow pit?

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MR. YAVNER: Your Honor, I object to this. I hadn't wanted to seem to be stopping things, but there is no relationship between the provisions of the original contract and of the completion contract. In the completion contract we will get to that -- there was a desire to move things along in such a way that there would be the utmost cooperation, but some of the provisions were entirely different, and I don't think that it is fair to make a comparison of it.

MR. POWERS: If that is the case I think Mr.

Yavner just talked himself out of an awful lot of damages
with respect to the completion contract, and I will accept

1	MD A Crane - cross 101
2	his statement.
3	MR. YAVNER: I don't think so at all.
4	MR. POWERS: If there is no relationship
5	MR. YAVNER: I never said that. I never said that
6	MR. POWERS: That is what I understood you to
7	say.
8	MR. YAVNER: How dare you make a statement like
9	that, that there is no relationship.
10	MR. POWERS: Your Honor and I heard what Mr. Yavner
11	said. Maybe I misinterpreted it. He said there are
12	different provisions. If they are different
13	THE COURT: That's what I thought you said, too,
14	Mr. Yavner.
15	MR. YAVNER: If I did then I am sorry, that is n't
16	what I meant. There are differences between the two
17	contracts. I will check them out and have them exact for
18	tomorrow, those differences.
19	THE COURT: It seems to me I am going to allow the
20	continuation of the inquiry. You are alleging, it seems to
21	me, default on the part of the plaintiff in performance.
22	Plaintiff is now alleging that in terms of your treatment
23	and he is introducing I gather some evidence to show how
24	you treated someone else as evidence, I gather, of the fact
25	the conditions imposed upon him were unreasonable, and I am

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	MD B Crane - cross 102
2	going to allow it.
3	Q I forget the exact wording of the question, but
4	my recollection is with respect to the completion contract
5	did you require the completion contractor to use the borrow
6	pit/
7	A I honestly don't remember. I would have to look
8	at the contract.
9	
10	Q Could you look at the contract, please, or the
	prebid document, minutes of the prebid meeting. Would that
11	have anything in it?
12	(Pause)
13	MR. POWERS: Would a short recess be in order,
14	your Honor?
15	THE COURT: Let's finish with Mr. Crane.
16	
17	A What was your question again, Mr. Powers?
18	Q QWas the completion contractor required to use the
	borrow pit?
19	A No, because all site work was removed from the wor
20	of the new contractor.
21	QW Who did the new site work?
22	A It was done by a separate contractor.
23	Q Was he required to use
24	A NcNamee.
25	
	Q Was he required to use the borrow pit?

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A Again, I don't know. It wouldn't be in here anyway. It was not part of this discussion. This concerned the contractor for general construction. I'm sorry I took the time, but it just occurred to me. The site work was taken out of the contract that Mars and Normel ended up with anyway.

Q Isn't it a fact that you came to the conclusion that the contractor, namely the plaintiff herein, was entitled to get paid some money for being required to use the borrow pit, and it was just a question of the quantum, the amount, that was in dispute?

A I wouldn't want to say that, no. The question of whether or not he should be compensated in connection with that borrow pit was put in the category for the legal minds to sort out as to what obligation or commitment was involved in the use of material from the borrow pit.

- Q Do you remember giving testimony in your offices?
- A Yes.
- Q Do you remember at that time testifying with respect to the fill purchased from off site?
 - A I don't recall specifically, no.
- Q You have another item here, 8 F, pipe trench extensions. That claim extended from July of 1964?
 - A That's correct.
 - Q In a sum of slightly over \$3000?

 SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
 FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1	MD D	C	
2		Crane - cross	104
3		That's correct.	
	Q	And	
4	A	The note that I have opposite that said "Reje	et.
5	See file.	Apparently there was a file setting forth t	he
6	reason why	y the claim was rejected.	
7	Q	But you don't recall why that was rejected?	
8	A	No.	
9	Q	There is another, 9 F, extra for trench rock;	
0	is that ri		
1	A	Correct.	
2	Qq		
3	A	What is your comment with respect to that?	
4		The claim was dated June 10, 1965. The amount	
). The comment is that of that \$7787.40 was pa	aid
5	in one of	the previous change orders. The balance of	
6	\$14,779.80	is being checked that is to say, presumable	l y
7	the quanti	ties of rock were being checked.	
8	Q	So it took from June until January or February	, to
9	check whet	her there was an entitlement to that \$14,000?	
0		As I recall it, the thing was complicated a li	ttle
1		fact that this was excavation of rock in tren	
2		was contention that the price for excavation of	
3			
4	ĺ	enches should be higher than the excavation of	rock
	in open ex	cavation. That was also part of this "being	

checked" business.

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Crane - cross

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Didn't the schedule of unit prices annexed to the contract cover trench rock versus mass rock excavation?

A Yes, it does.

Q So then there was no problem in determination, all you had to do was look at the contract to determine how much for mass, how much for trench; isn't that correct?

A That would seem to be the case, yes.

Q And that took over eight months to do, and payment still hadn't been made of that \$14,000 differential?

Now, there is an item down here, 10 F, which is progress photographs. I ask you to refer to the provision in the contract which requires the contractor for general construction and site work to take progress photographs.

A I think I would need the supplementary general conditions. I recall from recently going over the document= ation here that this was an issue between the four primes. There were job meeting notes, as I recall it, at which it was proposed that the cost be divided among the four primes. In the supplementary general conditions, Article 48, it says:

"Progress photographs shall be provided to the architect at monthly intervals during construction. Provide two views of each builing from points directed. Prints shall

MD F

Crane - cross

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be submitted in duplicate, size 8 inches by 10 inches, glossy surface, fully labeled, dated, and produced by a professional photographer."

Now these conditions that you are referring to are contained in the contract of all of the prime contractors; isn't that true?

A That's correct.

Q The heating and ventilating contractor; is that correct?

A Correct.

Q The electrical contractor?

A Yes.

Q And the plumbing contractor?

A Yes. And the general.

Q Yes. What is the basis for concluding that the cost of these photographs are the sole responsibility of the contractor for general consturction?

A Is I said, I recall a discussion documented in a job meeting this question came up. My interpretation would be that we own four sets of progress photographs, and it is our privilege to negotiate achange order with three of those contractors to eliminate the requirement from their contract and get just one set of progress photos.

I would judge it to be the owner's prerogative to

MR. YAVNER: Then I am not hearing. I thought you

said that he said it was arbitrarily.

MR. POWERS: No.

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A I said in my opinion the owner owned four sets
of progress photos, one set from each of the prime
contractors. That's rather ridiculous. So, therefore,
it probably was decided that Fabrizio & Martin would furnish
the progress photographs and deductions to the other
contracts would be negotiated to remove that obligation from
them and reduce the amount of their contract.

Q In preparing his bid, how would he know that this is going to be the determination of the owner?

A He is supposed to be prepared to perform all of the requirements of that contract. The fact the owner had required four sets doesn't alleviate Fabrizio & Martin from being obliged to furnish his set.

Q Then you are saying it is not a reasonable interpretation based on what you read that a contractor would assume since there are four prime contractors I have to pay one - fourth of the cost?

A I wouldn't make that assumption, no. I would assume I had to furnish a set of photographs, just the same as I have to furnish insurance, for instacne.

Q Might that be because your company wrote the specs?

1	MD J Crane - corss 110
2	was submitted in June, or at the latest July of 1965, and a
3	of February 1966 no determination had been made; right?
4	A Correct.
5	Q And we are dealing here with a \$12,000 item; is
6	that correct?
7	A Correct.
*	MR. POWERS: I don't believe I have anything
9	further.
10	THE COURT: Mr. Trager, do you have anything of
11	this witness?
12	MR. TRAGER: Just a couple of questions, your
13	Honor.
14	CROSS EXAMINATION
15	BY MR. TRAGER:
16	Q Mr. Crane, in your direct testimony you referred
17	to that letter that was written February 28, 1966, to
18	Fabrizio & Martin, I believe, about the meeting that was
19	held Pebruary 1, 1966, in Mr. Yavner's office?
20	A Yes.
21	Q Do you recall if anyone from Aetna was there?
22	A In Mr. Yavner's office?
23	e Yes.
24	A To the best of my knowledge, no.
25	Q Do you recall ever meeting with anyone from Astna

1	MD Crane - cross 111
2	regarding this?
3	A No.
4	
5	O I recall your testifying in direct testimony to writing Aetna.
6	
7	A Writing to Aetna? O Yes.
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9	
10	Q Did you ever write Aetna?
11	A I don't recall writing, no. I think the question
12	may have been in relation to whether or not the School
	Board wrote to Aetna?
13	While you were handling this, do you know what
14	the bonding company's position was, of your own knowledge?
15	A I don't really understand the question. What do
16	you mean by "our position"?
17	Q The bonding company's position.
18	THE COURT: About what?
19	A About what?
20	O You indicated there came a time when you took care
21	of completion.
22	A Who took care?
23	O You supervised when Fabrizio & Martin was
24	terminated?
25	A Yes.
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Crane - cross

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Do you know of your own knowledge what the Q bonding company's position was with respect to completion?

A No.

Do you recall whether or not the original contract with Pabrizio & Martin for general construction included the site work and the curbine?

Yes, it did.

After the termination in March of '66, and a contract was re-let, did the contract as re-let with Mars and Normel, as you testified, that the Board entered into a contract with them for completion -- did that completion contract include the contract for site work and the curbs?

No, it did not.

How were those items that were originally part of Fabrizio's contract completed?

Fabrizio had a subcontract with McNamee Construction Company -- something named McNamee, ar way -for some of the site work, primarly roads, sidewalks, curbs, and so on. That was a clearly defineable separate subcontract.

The Board negotiated a lump sum contract with McNamee for, as I recall it, the amount of that subcontract. We also negotiated a separate contract with McNamee on a

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Crane - cross

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cost plus guaranteed max fee basis to do miscellaneous site work other than roads, curbs, and there may have been a couple of other easily defineable items. But there were, of course, an assortment of potholes and partially filled trenches and things which were very difficult to define. Therefore, it was deemed best to try to make an approximation of what it would cost to clean up those items and put it into a guaranteed max contract with McNamee.

- ? Were you familiar with the circumstances and the facts that led up to the entering into of those agreements?
 - A Yes.
 - You worked on that?
 - A Yes.
- O Do you know approximately how much those contracts were, one with McNamee and one with Bradhurst?
- A There were two with McNamee and one with Bradhurst.

 McNamee had two separate contracts.
 - Approximately how much were they?
- A The road contract -- roads, curbs -- what I define as easily defineable items of work, it seems to me was around \$85,000. The cost plus guaranteed max contract I think was around \$25,000.
 - And the one with Bradhusst, site?

- A Bradhurst had a separate contract for essentially landscaping as different from -- landscaping, meaning planting, seeding, loaming, that sort of business. I don't recall off hand what that amount was, no.
 - O Do you know if it was in excess of \$5000?
 - A I am sure it was in excess of \$5000, yes.
- You testified that these contracts were negotiated.
 Were any other bids taken in connection with these
 contracts?
- A There were no other bids taken, to my knowledge and recollection, in connection with the two McNamee contracts.

I have a recollection that we did at least try to get some outside bids on the planting and site work which ended up with Bradhurst,

- Do you know from your own knowledge whether the bids were advertised for, when you say solicited other bids?
 - A No, I don't recall.
- When the contract was terminated and the new contract entered into with Mars, Nommel, that contract was advertised, you advertised for bids for the completion of that work?
 - A That's right.

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Did the advertisement for those bids include the items covered by Bradhurst and McNamee?

A No.

MR. TRAGER: I have no further questions.

THE COURT: Anything further, Mr. Yavner?

MR. YAVER: Yes.

REDIRECT EXAMINATION

BY MR. YAVNER:

Mr. Crane, reference was made by Mr. Powers to the fact that several claims took six months or eight months to adjust. Are there provisions in the contract for such situations, like arbitration?

MR. POWERS: Objection, your Honor. Again we have no contract. Whether there is arbitration, or what, is immaterial here.

MR. YAVNER: Yes, but at that time - the point I understood that Mr. Powers was making was that Mr. Pabrizio was being treated in a certain way at a certain time in history. At that time in history my position is there was a contract of which hecould have taken advantage of its provisions and that's the reason for my question. It seems to me if he is permitted to go into that, as to what was happening at that time --

THE COURT: You are the one who introduced the

matter, Mr. Yavner, in the first instance.

MR. YAVNER: That's right.

THE COURT: The question of whether or not the provisions can be arbitrated or not is not really essential to our point here. He was merely doing as you were doing, saying that by your client's action they were delayed in being paid, and, therefore, they had a basis for something, I suppose, and refused to attempt to carry out the contract. The fact whether there was arbitration or not has nothing to do with it.

Proceed.

O Do you recall whether there were any oral or written assurances of any kind given to Mr. Pabrizio and his attorney either that night or within the next several days?

THE COURT: Assurances about what?

MR. YAVNER: Of the action that was going to be taken about each one of these items.

MR. POWERS: If there is any evidence of assurances, let Mr. Yavner show it to the witness.

MR. YAVNER: My question related to oral or written, if you recall.

A It is my recollection- that when all of the parties to this meeting left in the wee hours of the morning there

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Crane - redirect

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was agreement that the items were going to be settled out agreeably to all parties so far as you can where there is difference of opinion, but we certainly went out of there, for my part, and I thought I measured the mood of the others, that we are here to get these things settled out. Maybe some of the extras will be denied, maybe there will be a decision that the value or the equity is somewhere between zero and the amount claimed, but in any event there was not an adamant "we're not going to do anything about this" mood here.

Do you know anything that went wrong on your side during the next month?

A No.

Do you recall what was alleged to be the precipitating issue for Fabrizio in walking off the job at the beginning of March?

A No.

MR. POWERS: I think something has to be clarified as to when, where, or from whom this information was obtained. It could be hearsay, or what have you, for all we know from the question.

THE COURT: I think the more appropriate objection would be that it doesn't seem to me to be appropriate redirect.

1	MD Crane - redirect 118
2	MR. POWERS: I second the motion, your Honor.
3	Q Mr. Crane, did you send any letter to Pabrizio
4	after this February 1 meeting?
5	A Yes, I did.
6	? I don't recall, has that been referred to today?
7	A It's been referred to at least one of the
8	letters I wrote to him has been referred to today.
9	Q May I see that, please?
10	A I think Mr. Powers introduced it.
11	MR. POWERS: I believe it was introduced on your
12	direct testimony, Mr. Yavner. It was a February 28th
13	letter.
14	A Excmse me, it was not introduced. I have it here
15	Q Is that a letter you sent to Mr. Fabrizio?
16	A Yes.
17	MR.YAVNER: I offer it in evidence.
18	MR. POWERS: No objection.
19	(Defendant Ekhibit No. 83 was received in
20	evidence.)
21	THE COURT: You are not going into that letter
22	again, are you?
23	MR. YAVNER: I am not, your Honor.
24	I have no further questions, your Honor.
25	THE COURT: Anything further, Mr. Powers?

MD

Crane - redirect

119

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MR. POWERS: I have nothing further, your Honor.

THE COURT: Thankyou, Mr. Crane; you may be excused.

Is there any reason why Mr. Crane can't return to Boston, as he desires to do?

(No response.)

THE COURT: I guess you can leave.

Call your next witness.

MR. YAVNER: May I request that we continue tomorrow?

THE COURT: Listen, Mr. Yavner, and Mr. Powers, and Mr. Trager, this case is proceeding at a pace that I am finding intolerable. I am not here to be on this case for days and days, and I want the pace of this trial to quicken, and for you people to get yourselves organized so you will be in a position to try this cade in the way it ought to be tried.

Let's proceed with the case. Call your next witness, please.

MR. YAVNER: My next witness is Dr. Fowler.

I do need five minutes, because the papers all are strewn around here.

THE COURT: You better get your papers organized.

MD

Fowler - direct 121

contractor Pabrizio & Martin over a period for some time.

In December these disputes resulted in the contractor walking off the job. Meetings were held among the several parties, architect, contractor, representative of the bonding company, members of the Board of Education, members of the administrative staff, in an effort to determine the cause of the disputes and to get work begun again on the school project.

These meetings were held in January of 1965.

There were two that I recall specifically. At these meetings the concerns of the contractor, Pabrizio & Martin, were aired. The architect had an opportunity to present his concerns.

After the second of these two meetings negotiations took place resulting in the execution of what's been referred earlier in testimony as the supplemental agreement.

O I show you a copy of Exhibit 41 for identification.

Is that the supplemental agreement to which you refer?

A It is that agreement together with the consent of the surety company which was affixed to it.

MR. YAVNER: I offer this in evidence.

MR. POWERS: Your Honor, Mr. Yavner insists on following the same course. I think it is something your

Honor has ruled on previously. The contract is declared ull, void and illegal, and if the contract is the supplemental agreement on which it is based is also illegal, and the whole thing falls as a package.

MR. YAVNER: I agree that the supplemental agreement is void along with the initial contract, but it is perfectly proper to use it in determining a measure of the damages and to show what happened in the situation.

Just as we referred before to Mr. Crane's effort to resolve long-standing disputes, here this was an effortto resolve a long-standing dispute and it was done in certain ways, and the Board was supposed to reap certain benefits from it, and it didn't, and it was supposed to reap chose benefits from the bonding company as well as from the contractor.

And that's the reason that this is brought out, because if we don't bring it out as to what happened here then how can one ever tell what it was that the Board was deprived of, and what damages it suffered?

This is a major damage that it suffered.

MR. POWERS: As your Honor indicated previously, and I think correctly so, the way for Mr. Yavner to prove his damages is to obtain evidence of facts, not agreements, and putting an agreement in evidence.

MD

Powler - direct

What are the facts? In what way does he claim the plaintiff was deficient and negligent, and in what ways did he delay the job? Those facts aren't coming from an agreement, your Honor, they come from the testimony of witnesses.

THECOURT: I am glad to see, Mr. Powers, at least
I have communicated to one of the parties in this case.
That is precisely how I felt, and that is precisely what I am attempting to explain. I have said that several times in the course of this trial.

O Dr. Fowler, is the School Board being sued by any of the other prime contracts for delay damages?

MR. POWERS: Objection, your Honor.

MR. TRAGER: Objection.

MR. POWERS: Whether the School Board is being sued or not again is completely immaterial to the facts of this case.

In addition, even if it is being sued whatever its damages may be are in never-never land.

THE COURT: Do you have anything to add?

MR. TRAGER: Just youwent into that on the third party question this morning with respect to those other actions.

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	Joia
1	MD Fowler - direct 123a
2	THE COMET: I will listen to what you have to
3	say.
4	MR. YAVNER: I am taking exception to your
5	ruling. I think it is relevant.
6	THE COURT: If that is all you have to say the
7	objection is sustained.
8	MR. YAVNER: I heard your point and responded to
9	it this morning.
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MP 1 Fowler - direct

O Dr. Fowler, I show you this letter dated January

13th, signed by Duane Ahlf, addressed to Aetna Casualty &

Surety Company.

Dr. Fowler, did you help prepare this letter, or did you have this in your files?

THE COURT: What is the exhibit number of that?

MR. YAVENER: I am sorry. 51 for identification.

A Yes. This was completed at my direction for Dr. Ahlf's signature.

MR. YAVNEN: I offer this.

MR. POWERS: Your Honor, I am sorry to sound like a broken record, but I have to object. Again, the only thing this letter refers to is a provision contained in the supplemental agreement, and there was allegedly a breach of one provision of the supplemental agreement by the plaintiff, and again I apologise, but I just have to object.

MR. YAVNER: All right. I have several --

THE COURT: You don't have to apologize for objecting if your objection is sound. Don't apologize for it.

All right.

MR. TRAGER: I object, your Honor. It refers to a copy enclosed. There is no copy attached. I think it is irrelevant on the same grounds, that it refers to a collateral agreement which your Honor has ruled on as not being proper

MP 2 Fowler - direct

for admission.

MR. YAVNER: But the letter does show, and so do several others that I have following it, not simply that there was a violation of the supplementary agreement but rather that they had substantially failed to complete the building by a time agreed upon, which was in itself causing us damage, and this is brought in.

Now, I can, of ocurse, say to Dr. Fowler, "Were they late in getting the buildings built? What were the dates that they should have been built?" But it seems to me that these letters bring it out very clearly. They have got the dates in them.

MR. POWERS: The only date or the only agreement or the only document which provides a date for the completion of any building is the supplemental agreement, and Mr. Yavner well knows this, and he is still trying to circumvent this, because he cannot get the evidence in through the supplemental agreement, and he is trying to circumvent it and get it in through letters, and this is the only place where this date is mentioned as to the completion of the building identified in the letter.

MR. YAVMER: Mr. Powers, isn't it correct that the initial contract, which is in evidence, sets forth a time of completion for the entire project of approximately seventeen

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Fowler - direct

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months from the date that it began?

THE COURT: The objection is sustained. It seems to me, again, that as I understand it -- this is in no way restricting your proof in this case -- it just appears to me that you are taking the proof in a different way than you would be permitted to.

I think that if the time is of any essence in terms of damages, that the board can produce evidence to show that the building was not completed by X day and that this caused them damage.

The fact of the matter is that it is in an agreement which in itself is illegal, and we all know it is illegal, and that fact isn't going to help you. So what you really have to do is to make your proof in a different way than you insist upon doing.

You might consider that over the overnight recess. You have every right to prove your damages. You can't prove it by merely showing that there is an agreement to that effect which is in itself illegal.

Do you have the record here of the state of completion of each one of the --

MR. YAVNER: Let me withdraw that.

The middle school -- I am not sure Mr. Crane went into this -- the middle school consists of how many buildings?

MP 5 Powler - direct 128 in this case.

Does the contract, to your knowledge, require drawings to be prepared by the contractor which are known as as-built drawings?

MR. POWERS: Objection, your Honor.

THE COURT: Objection sustained.

Q Do you know whether as-built drawings were ever given to the Board of Education by the contractor?

- A Fabrisio & Martin?
- Q Yes.
- A To my knowledge, they were not.
- Q Did the architects prepare any analysis in about March of 1966 of the extent of completion of the buildings?
 - A Yes.
 - Q What was the nature of their analysis?

A One aspect of it was completed through taking pictures of the entire site and buildings, interior and exterior pictures, demonstrating the state of completion as of the time that Fabrizio walked off the job. Also in connection with preparing documents for advertising for bids for the completion work, there were written statements and some drawings indicating the degree of construction. There were punch lists indicating work that had not been properly done by Fabrizio & Martin. These were among the documents that we

MP 6 Fowler - direct 129	
had available at that time.	
Q Do you have these documents here or at your office	ce
now?	
A No. The documents	
() You mentioned photographs or pictures	
A The documents in accordance with the plans sub-	
poensed today are being sorted out in Mount Kisco and will	be
delivered to this courtroom as soon as possible. The phot	0-
graphs are available in your office.	
Q And the thind thing you mentioned: I think you s	aid
the architect had prepared certain analyses.	
A Yes, which would have been part of the specifica	-
tions book used at the time of the bidding for the complet	ion
contract. That book is also being looked for in Mount	
Kosco and should be delivered here as soon as it is found.	
That would also contain the information on what	we
call the punch list items for each of the buildings.	
Q Tell me: did Fabrizio leave the job in early Mar	ch?
A Yes.	
Q Was he kicked off by the board?	
A No.	
Q It was entirely Fabrizio's act to leave?	
A He did not show up to work.	
Q And was he then requested orally or in writing o	r
	had available at that time. Q Do you have these documents here or at your officenow? A No. The documents Q You mentioned photographs or pictures A The documents in accordance with the plans sub- poenned today are being sorted out in Mount Kisco and will delivered to this courtroom as soon as possible. The photographs are available in your office. Q And the thind thing you mentioned: I think you se the architect had prepared certain analyses. A Yes, which would have been part of the specifications book used at the time of the bidding for the complet contract. That book is also being looked for in Mount Kosco and should be delivered here as soon as it is found. That would also contain the information on what call the punch list items for each of the buildings. Q Tell me: did Fabrizio leave the job in early Mar A Yes. Q Was he kicked off by the board? A No. Q It was entirely Fabrizio's act to leave? A He did not show up to work.

1	MP 7 Fowler - direct 130
2	both to resume work?
3	A He was.
4	Q Did he?
5	A No.
6	Q Did you ask the bonding company to do anything
7	about this?
8	A Yes.
9	Q And what did they do?
10	A As I recall, they at one point, after Fabrizio's
11	default, wrote a letter to the school board in response to
12	letters and telegrams we had sent the bonding company. The
13	essence of that letter I do not have it in front of me -
14	was that they would take a wait-and-see attitude.
15	Q Did they ever do more than that?
16	MR. TRAGER: I will object, your Honor. I will
17	object to the witness paraphrasing the document, unless he
18	produces it and we can see exactly what it says.
19	THE COURT: Will you read back the answer?
20	(Answer read.)
21	MR. TRAGER: I will renew my objection, your
22	Honor. He is not at all certain whether or not there was a
23	letter, and, in addition to that, he is not exactly certain
24	what it says. He is paraphrasing.
25	THE COURT: Do you have the letter?

Q Dr. Fowler, here are several of the exhibits for identification. Would you look through these and see if any of these is the letter or telegram to which you referred?

THE COURT: On reflection, I think the testimony is proper. I will overrule the objection.

A The letter from the bonding company is not here.

There is a mention of that letter in this communication.

Q All right. You don't have it --

MR. TRAGER: I thought the testimony had been --

THE COURT: Your objection, to the previous answer, is overruled. As I understand it, the answer was that the telegrams and so forth and so on -- the bonding company took an attitude, a wait-and-see attitude, which was the essence of the letter.

MR. YAVNER: I asked a question after that. His first answer is, as I recall it, that they would wait and see, and then I asked --

A I recall specifically receiving two letters. One letter was in response to a letter which we had sent them, asking them to fulfil their obligations of the performance bond. Another letter, which I remember receiving, was one inwhich they submitted to us the application which Fabrizio & Martin had executed in support of the performance and labor and material payment bonds and asked that we supply certain

MP	9	Fowler - direct	132
+-	them in	connection with the	

Q Do you recall that the bonding company at one point suggested having a meeting to discuss the matter with you?

A Could you be more specific about what point in time you are speaking of?

Q I show you Exhibit 61 for identification. Does this refresh your recollection?

A Yes. This letter apparently makes reference to the letter from Aetna Casualty & Surety Company by Harold C. Wareham.

Q Did they then ever have a meeting with you?

A No.

O During the course of the time that Fabrizio & Martin was the general contractor, did you or they convert retainages into bonds to be held in escrow by a bank?

A They applied to the Board of Education for that privilege and were granted that privilege, early in our relationship with them.

THE COURT: Relationship with whom?
THE WITNESS: Fabrizio & Martin.

Q I show you a letter written by you to the Bank of Westchester, the National Bank of Westchester, dated March 28, 1966, marked Exhibit 60. Does this and the attachment relate to these bonds that were substituted for the retained

MP 10

Fowler - direct

moneys under the contract?

A Yes.

MR. YAVNER: I offer this in evidence.

THE COURT: Gentlemen, I am going to adjourn.

Mr. Yavner, I am directing you, that any documents that you are contemplating or considering introducing in evidence, you are to furnish those documents, get them together and furnish them to Mr. Powers and Mr. Trager, and I directing Mr. Powers and Mr. Trager to go over those documents and be prepared with regard to them to make objections when Mr. Yavner is at the point where he submits them in evidence.

I am also directing both of you gentlemen to do the same thing with regard to any of the exhibits that you are planning to produce in this case.

The case is adjourned, to resume tomorrow at tenthirty. I have two sentences, sentences in two cases at
ten o'clock, so that I will not be able to reach you until
ten-thirty tomorrow. But, Mr. Powers and Mr. Yavner, we
are going to have a full day, and I think you should come
prepared with all the witnesses.

Court is adjourned until ten-thirty tomorrow morning.

(Adjourned to March 2, 1973, at 10:30 a.m.)

1		WITNESS INDEX		. 134
2	Name	Direct	Cross Re	direct Recross
3	Robert P. Crane	2	83	
4			63	115
5	Charles W. Powler	120		
6		EVUTDIM INDEV		
7		EXHIBIT INDEX		
8	Defendant Board of Education	Ident	ification	In Evidence
9	2-В		*	25
10	3 through 14			25
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13	81		52	58
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17	Plaintiff			
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313a TRANSCRIPT OF PROCEEDINGS MARCH 2. 1973 135 pge 2 PABRIZIO & MARTIN, INCORPORATED, 66 Civ. 2935 3 VB. THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 et al. 5 March 2, 1973 10:00 a.m. 6 7 (Trial resumed.) CHARLES W. FOWLER, resumed. 8 9 CONTINUED DIRECT EXAMINATION 10 BY MR. YAVNER: Mr. Powler, did you prepare the schedules that appear 11 in the supplement D and amended answer to interrogatories? 12 13 I did. The item of contract amount for Fabrizio & Martin 14 is stated as \$2,620,901. State how you arrived at that 15 16 figure? I took the original contract amount of \$2,489,400 17 and added to it those change orders which were executed by all 18 parties totalling \$131,501 to reach the total of \$2,620,901. 19 Are there any records here in addition to the change 20 0 order and the certificates that show the payment by the School 21 22 Board of that? 23 That show payment? A

funds that the School Board has paid?

THE COURT: Is that \$2,600,000 the total amount of

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Fowler - direct

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A No, your Honor. That is what I would call the amended contract amount.

THE COURT: How much did you pay?

- Q Do you know the answer to the question?
- A Yes.
- Q Go ahead.

A paid to Fabrizio & Martin, or on his behalf, \$2,126,756.

Your next item is general construction costs in the amount of \$2,771,317.

State how you arrived at that?

A May I see the document?

THE COURT: What are you reading from?

MR. YAVNER: The supplemental interrogatories that were introduced yesterday, that were submitted yesterday.

MR. POWERS: Your Honor, if I may, I would object to the using of the supplemental and amended answers to interrogatories as a basis for proving anything.

There are obviously documents which I would assume support what is contained in the interrogatories or answers to interrogatories and--

THE COURT: I am inclined to agree with that. At least it seems to me that the interrogatories can't be taken as a basis.

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Fowler - direct

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The witness may testify, it seems to me, as to

what the construction costs were, and I certainly want to

hear that.

I don't think he can arrive at a figure in interrogatories of two million, seven--of course you are doing it correctly in trying to find out how he arrived at a figure.

MR. YAVNER: The only reason for using this--I realize the interrogatory is not in evidence but I do want to get a correct set of figures. That's the only reason I am using it.

THE COURT: I think it is appropriate. You can indicate from the interrogatories he arrived at a certain cost but ask him what the basis was.

A The first part were the payments to Fabrizio & Martin which I have mentioned \$2,126,756. Those items were offered in evidence yesterday.

I don't have those here in front of me.

The next item --

MR. POWERS: If I may, what items are you referring to?

A The requisitions for Fabrizio and Martin.

MR. POWERS: Thank you.

A The next item is a loss on retainage bonds which were held in escrow for Fabrizio and Martin of \$5,103.

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Fowler - direct

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MR. POWERS: I object. This is the reason I am objecting to having the witness testify from supplemental and amended answers to interrogatories.

We are entitled to cross examination of this witness with respect to the basis on which he came to this figure and to do that we need the documents that he is relying on.

The reason I bring this up is with respect to these alleged losses on the bonds, I think the evidence will indicate that a good portion of that exhibit had nothing to do with the construction--

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THE COURT: Let me see it.

(Pause.)

These were his retainnage moneys.

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Fowler-direct

MR. POWERS: I think there was evidence yesterday to the effect that an applicationwas made by Fabrizio & Martin to have its retainnage money put in bonds so that

the money would obviously and hopefully appreciate and draw

That request was granted.

In effect, these moneys that were transferred into bonds or used to purchase bonds were moneys, retaining moneys, for work that Fabrizio & Martinhad actually performed and the 10 per cent retainnage was moneys that were withheld from payments under the agreement between the parties.

So in effect if the bonds lost money they were Fabrizio & Martin's moneys.

MR. YAVNER: No, your Honor.

The retainnage was under the provisions of the contract and the board retains 10 per cent which is later reduced to a lesser amount -- but initially it retains 10 per cent of the contract amounts in order to protect itself against damages that may be caused by the contractor or by its failure to perform in any respect at all.

Under the State Finance Law a contractor is permitted to substitute for the cash retainnage bonds in order that he may have liquid capital to carry on his business.

Fabrizio choze to do this and substituted bonds for cash retainnage.

At the time the event occurred that required the Board to take advantage of the reason for the retainnage. Under the contract the bonds had deteriorated in value so that we did not have the full amount of coverage to which we were entitled under the contract.

Had the job gone on to the very end with no problem then it would have been immaterial whether the bonds appreciated in value or depreciated in value but at the time that we took possession of the bonds under the contract they did not represent the full value of the amount that the Board was supposed to have.

MR. POWERS: May I make one statement in connection with that?

THE COURT: It does not give me, in any event, assuming you are correct, that that is a basis for rejecting the admission of this.

It would appear to me that the argument you make is not one in terms of its inadmissibility but in terms of whether or not that is in fact a loss that occurred.

I don't think this argument goes to admissibility. It goes to the merits of the claim as to whether in fact there was a loss.

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MR. POWERS: If I may address myself to the Court: In order for Mr. Yavner to -- I think his own statement indicates that -- substantiate this as a loss to the School Board he must prove that Fabrizio & Martin breached its contract and it was because of this breach that the School Board was entitled to these bonds and he cannot prove a breach of contract because there is no contract, and that is really the objection.

This can only be an item of damage if the School Board proves that Fabrizio & Martin breached the contract which the School Board cannot prove.

THE COURT: Do you want to say something? I am not advising you to.

MR. TRAGER: I just wanted to say, more or less reiterate what Mr. Powers said, that this is not an item embraced from damages from the illegality of the contract.

I move to strike all references in Mr. Yawner's remarks to the underlying basic contract.

THE COURT: I am going to receive the document. That does not mean that I am going to consider it as an item. I'll receive the document. It will be admitted.

(Defendant's Exhibit 84 received in evidence.)

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Q What is the next item that comprises this total amount?

A The next item is payments to Mars - Normel, the completion contractor, \$428,164 represented in these eight requisitions.

MR. TRAGER: I object, your Honor.

THE COURT: What are you object to that for? He is talking about construction costs. Whether or not you are going to be held for them is another question, but certainly the completion is --

MR. TRAGER: I object on this basis, your Honor:
Yesterday Mr. Yavner made this statement to the
Court, and I will quote:

THE COURT: What page is that?

MR. TRAGER: Page 100.

He said: "Your Honor, I object to this. I had not wanted to seem to be stopping things, but there is no relationship between the provisions of the original contract and of the completion contract."

on that basis, "In the completion contract" -- we will get to that -- "there was a desire to move things along in such a way that there would be the utmost cooperation, but some of the provisions were entirely different, and I don't think that it is fair to make a comparison."

Then on page 101 Mr. Yavner said, "If I did then I'm sorry, that isn't what I meant. There are differences between the two contracts."

On that basis I object to any testimony with respect to payments that were made to Mars-Normel.

THE COURT: I don't even have to listen to Mr. Yavner for that. I am going to overrule that objection.

I think Mr. Yavner was addressing himself to an entirely different problem, at least it seemed to me. He was attempting to say that maybe some of the costs in the completion contract might have been much greater than were required in the other and that was because of the fact that they wanted to move ahead faster and get it completed.

That does not necessarily mean, it seems to me, that this is not a part of the construction costs.

Overruled.

Proceed.

MR. POWERS: If your Honor please, it seems to me it is putting the cart before the horse in permitting the testimony to come in this way and I say that because it is factual and I think everyone in this courtroom has to admit that there were changes made between the original contract and the Mars-Normel contract.

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Powler-direct

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It was just not a difference in increasing the price, there were items included in the Mars-Normel contract that were not included in the Fabrizio contract.

THE COURT: But the point about that is for you to bring that out on cross-examination. It has nothing to do with the issues as to the defendant in this case attempting to put before the Court what it cost them to get these buildings completed.

Proceed, please.

MR. POWERS: Thank you.

0 Do you have the records here, the official records of the School District?

A Yes.

MR. YAVNER: Have you examined them?

MR. POWERS: Yes.

We object to all of these records, your Honor, all of these requisitions, on the ground that the contract with Mars-Normel was in effect a time and material contract.

These documents do not have any back-up material which is required in a time and material contract; namely, the contractor has to show how many men he had on the job, how many hours they worked, what equipment he had on the job, how many hours the equipment worked and so forth.

These records are just summaries and an application

for payment by Mars-Normel.

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THE COURT: Mr. Powers, you are still engaged in argument on the weight of that documentation.

The point is that it is the documentation. You are going to have a right to cross-examine this man and bring out the fact as to whether or not the items that are in there can be justified. There is no point in it. You are not arguing admissibility. You are arguing the best weight.

MR. POWERS: I suspect the problem, your Honor, is I don't like the burden being shifted to me when I don't think I should have the burden because I think the burden is initially on the plaintiff or the defendant here to make out its case and I don't think this is a way of making out its case.

out their case but at the same time if they have not done that and you apparently feel that these documents are not making out their case, then it is certainly your obligation to point that out and you can point that out by cross-examining this man.

MR. POWERS: Thank you, your Honor. I will try to refrain in the future.

MR. YAVNER: I offer these documents in evidence.
These consist of --

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

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what that exhibit is.

A It consists of a claim form made out to the School District by Mars Associates, Inc. and Normel Construction Corporation for \$33,759.21, supported by certain items of cost, five pages of items of cost.

Attached to all of that is a certificate from the architect John C. Harkness, certifying that Mars is entitled to this first payment of \$33,759.21.

Q I show you 85B, and please explain that one.

A It is a similar requisition and claim form, also with certification from the architect that Mars is entitled to the second payment-

THE COURT: Why don't we get some dates on this?

A June 14, 1966.

THE COURT: What is the date of 85A?

MR. YAVNER: The date of this one was May 20, 1966.

A Second payment of \$142,269.24, making a total payment of \$176,028.45 as of the second payment.

Q I show you 85C, and please state what that shows.

A Similar requisition and supporting material, fourth payment of \$44,943.29.

Q 85D, Dr. Fowler.

A 85D -- I'm sorry, I didn't give the date of that last one. The date was August 18, 1966.

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1	gtg 7 Po	wler-direct	148a
2		is September 21,	
3	payment to Mars Associat		
5	Q Please look at A Dated December	85E. 8, 1966, claim form	ng supporting
6	materials, seventh payme		, , , , , , , , , , , , , , , , , , , ,
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SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Daniel F. MacNamee and Company.

What is the full name of the MacNamee Company?

And what was the completion contract for with that

1	gte 2 Fowler - direct 150
2	company?
3	What was the nature of it.
à	A There were three separate agrements; general site
5	work, miscellaneous site work and parking and curbing.
6	Q Were all payments made to MacNamee under one requi-
7	sition for all three agreements or were there separate ones?
8	A Separate.
9	Q Do you have the mequisitions and the payment cer-
10	tificates with you here?
11	A I do.
12	Q May I have them, please?
13	A Yes. (Handing.)
14	MR. POWERS: Your Honor, I raise the same objection
15	as to these documents and I did before.
16	THE COURT: I don't know what those documents are.
17	What are they?
18	MR. POWERS: They are requisitions similar to what
19	have been submitted to your Honor only for a different con-
20	tract.
21	THE COURT: Is this a part of construction costs?
22	THE WITNESS: Yes.
23	THE COURT: Apart of that two million, seven that
24	you computed?
25	THE WITNESS: Yes.

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THE COURT: And these are the costs for the completion of the middle school, is that what it is?

THE WITNESS: That's correct. In order for us to complete the contract we hired several contractors rather than one.

THE COURT: All right.

MR. POWERS: Maybe it would assist your Honor if I could have a voir dire on this, because I truly feel that these documents should not be introduced in evidence. I can appreciate your problem, your Honor, but I feel strongly and with all due respect, I truly feel that these should not be admitted --

THE COURT: You are always entitled to a voir dire as long as it is a voir dire.

MR. POWERS: Strickly, I hope. If I go beyond that-THE COURT: You can be sure you will hear about it if you do.

VOIR DIRE EXAMINATION

BY MR. POWERS:

Dr. Powler, was any portion of the work to be performed by MacNamee to be performed on a time and material basis?

- A Yes.
- 0 And by time and material that means that the con-

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tractor is supposed to submit documents indicating the number of hours men worked and the amount of material and amount of equipment and the time the equipment is used, is that not correct?

MR. YAVNER: Objection to the form of the question about what the contractor was supposed to do.

We have the contracts with all of these firms.

I don't recall now whether this has been introduced in Mr. Cranes' testimony, but we have it here and we can produce it later. The question really is what is required and to what extent any such back up material is required.

THE COURT: Overruled. He has a right to ask him on cross examination any question he wants. If Dr. Fowler wants to clarify it and it is not an appropriate question, he can say so.

All right, proceed.

- A Would you repeat the question?
- Q Yes.

Under a time and material contract, the contractor must keep a record of the amount of man hours spent and the days on which those man hours are spent, the material used in connection with the work and submit invoices for the material and also keep a record of the equipment used in connection with the work and submit this material, isn't that correct?

1	gte 5	Powler - direct 153	
2	A Ye	s, he must justify that to the architect.	
3	Q Ri	ght.	
4	An	d do you have those documents here as part of	
5	these?		
6	A I	need to divide these up now, because two are on	
7	a time basis	and one is on a contract basis.	
8	Wi	th respect to those in the language of the cer-	
9	tification t	hat is called general contract and extra work	
0	outside the	contract, there is documentation supporting the	
1	building whi	ch MacNamee has made attached to the bills.	
2	2 Ye	s, there is with respect to the first invoice.	
3	Wh	at about the subsequent invoices?	
4	A Fr	om the information here, it would appear that the	-4
5	was retained	by the architect before being sent on to the	
6	School Board		
7	Q du	t you don't have it here with you?	
8	A Th	at's correct.	
9	Q An	d Mr. Crane, who was here yesterday, was the arc	hi-
0	tect's repre	sentative, was he not?	
1	A Th	at's correct.	
2	MR	. POWERS: Your Honor, based on that, I object	
3	to the intro	duction of all of these documents where the back	
4	up material	is not produced.	
5	ll On	debly I have no chiechton to this fivet involve	1

which does appear or first requisition which does appear to

upon the certification of its architect.

back up material.

MR. YAVNER: Your Honor, these documents are being offered to show that the School Board paid out these sums

The School Board does not review the back up material, the architect does that, and I don't believe that it is necessary in order for the documents showing on the basis on which we paid it, the only basis required by us, that we have that

MR. POWERS: Your Honor, I don't have to take the architect's certification on face value, I am entitled to go behind his certification and I think in order for proper evidence to be introduced the basis for that certification must be introduced as well.

How else can I cross examine with respect to these documents? How do I know this work was actually performed either on this job or another job or performed on any job?

This is information that must be submitted.

THE COURT: I am going to allow the documents in, but with the provise that Mr. Yavner is going to have to produce the architect or whoever, or the back up material in order to enable the plaintiff and the defendant to cross examine as to whether the money was, in fact, paid and for

1	gte 7 Fowler - direct 155
2	what.
3	It will be admitted, and that goes for Exhibit 85
4	as well, that will be admitted subject to verification.
5	MR. POWERS: Thank you, your Honor.
6	BY MR. YAVNER:
7	Q Dr. Fowler, is there a way of identifying these
8	three separate groups so that we can keep track of them
9	individually?
10	A I am not sure I understand your question.
11	I see that the three groups each begin with serial
12	number 1.
13	A Yes.
14	Q I see, this one says parking?
15	A That's right.
16	MR. YAVNER: I offer in evidence a group of six
17	documents relating to the payments to Daniel F. MacNamee and
18	Company on its general contract for the building of the
19	middle school with the request that these be marked 86A, B and
20	C and so forth.
21	MR. POWERS: Also, I assume, your Honor, that I have
22	my standing objection because this is, I feel, none of this
23	damage is related to the issues involved in the case.
24	Q Dr. Fowler, I show you Exhibit 86A. Please describe
25	the exhibit and its contents.

gte 8

Fowler - direct

A This is a certificate from the architect John C. Harkness, dated May 10th, 1966 entitling Daniel F. MacNamee and Company to a first payment of \$10,453.34. Attached to it is a bill of Daniel F. MacNamee and Company together with supporting materials.

Q 86B similarly please describe.

A It also is a certificate of the architect John C. Harkness, dated June 13, 1966, for payment to Daniel F. MacNamee and Company on general site contract of \$2,326.83.

Attached to it is a bill from Daniel F. MacNamee and Company.

Q 86C.

A Certificate of the architect John C. Harkness, dated July 19, 1966 entitling Daniel F. MacNamee and Company to a third payment on the site contract of \$3,975.82.

Q 86D.

A A certificate of the architect John C. Harkness, dated August 18, 1966, entitling Daniel F. MacNamee and Company to a payment of \$1179.66.

Attached to it is a bill from Daniel F. MacNamee and Company.

		7,00
take 3a	1	pge Fowler - direct
	2	Q 86E.
	3	A 86E is a certificate dated December 14, 1966 from
	4	John C. Harkness entitling Daniel F. MacNamee to a final
	5	payment of \$1992.85 on the general site contract totalling in
	6	14,928,50 payments \$19,982.50:
	7	Attached to it is a bill from Daniel F. MacNamee
	8	and Company.
	9	MR. YAVNER: Now, I offer a group of six documents
	10	to be marked 87A, B, C, and so forth.
	11	These are the similar requisitions and certifica-
	12	tions for MacNamee in connection with its parking and curbing
	13	contract.
	14	MR. POWERS: I would assume your Honor, this is
	15	covered in the previous objection, all of these.
	16	THE COURT: Yes. They will be received subject to
	17	the conditions indicated.
	18	A The parking and curbing contract was on a contract
	19	with a dollar amount and was not on time and materials.
	20	There is another exhibit, 86F. Please strike that.
	21	A 86F is change order number 1, issued by the archi-
	22	tect and approved and signed by the Board of Education and
	23	the contractor Mars Normel Construction Company.
	24	Q It must have been misplaced.
	25	A It should have been introduced earlier in talking

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

THE COURT: Mr. Powler will tell me.

MR. POWERS: \$2,620,000.

1	pge 3 Powler - direct
2	THE WITNESS: The totalI need that. (Indicating)
3	The total construction cost is \$2,771,317, which
4	includes the payments to Fabrizio and Martin, \$2,126,726 to
5	Pabrizio.
6	Then payment to Mars ofand this is where this
7	change order comes in, the actual total payment that we made
8	to Mars was 437,000 but 9,000 of that was work outside
9	what was inteded in the middle schools so we have subtracted
10	that and the total payment to Mars relating to the construc-
11	tion of the middle school was 426,164.
12	THE COURT: All of these items you have just intro-
13	duced, they are items that were the total of the amount of
14	THE WITNESS: The ones, no.
15	THE COURT: 84, 85, 86, and 87?
16	THE WITNESS: I think 84is that Mars Normel?
17	THE COURT: 84 is the retainage
18	THE WITNESS: The bonds. 85 would have been the
19	Mars Normel. That would have been the 428,164.
20	
21	THE COURT: You had some others?
22	THE WITNESS: This next set are to Daniel F.
23	MacNamee who did site work for the completion of the school.
24	The first set of exhibits 86 A through E was
21	\$19,928 and 50 cents.
25	Dr. Powler, may I see those blue sheets.

Fowler - direct

Did you make an analysis of change order 1 on the

Mars contract to show what work was the responsibility of

Fabrizio and Martin and what work was not?

MR. POWERS: I object, your Honor. There is no indication that Mr. Fowler made this up or has any knowledge with respect to the facts contained there. I don't think this is a matter for cross examination, your Honor.

THE COURT: Read the question.

(Question read.)

Q Dr. Fowler is not in a position to do that.
You should have that testimony from the architect.

MR. YAVNER: All I asked was whether he made the analysis. My question was to that.

THE COURT: Did you?

THE WITNESS: No.

MR. YAVNER: We are now at Exhibit 87A through E relating to the MacNamee contract for pushing and curbing.

Q Describe each of these 87A, B, C, D, and E, please.

A 87A is a certification from the architect dated June 14, 1966 entitling Daniel F. MacNamee and Company to a first payment of \$31,050 based on their contract to do the parking and curbing work.

87B is a certificate of the architect John C.
Harkness, dated July 19, 1966, entitling Daniel F. MacNamee

curbing contract.

end $3a^{22}$

87C is a certificate dated August 18 by the architect authorizing payment to Daniel F. MacNamee, a third pay-

ment on the paving and curbing contract of \$5,130.

and Company for a second payment of \$3600 on his paving and

21, 1966 authorizing payment to Daniel F. MacNamee and Company in the amount of \$16,470, the forth payment on the paving and curbing contract.

December 14, 1966 authorizing payment to Daniel F. MacNamee of \$3,596 for the paving and curbing contract together with supporting material attached.

Q Dr. Fowler there was additional set of documents attached to this group which the clerk has marked 88.

Please describe this.

A Exhibit 88 is a check, a cancelled check, in the amount of \$1,000 to Daniel F. MacNamee and Company, Incorporated, dated April 12, 1967, representing a payment of retainage on this parking and curbing contract.

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Fowler-direct

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THE COURT: In the contract with Fabrizio the School Board retained and bought \$2,000 bonds which constituted 10 per cent of the total contract?

THE WITNESS: 10 per cent of the payments due the contractor.

THE COURT: 10 per cent of that were for bonds purchased by the School Board.

THE WITNESS: Under the General Municipal Law an escrow account is set up.

THE COURT: The School Board bought bonds?

THE WITNESS: Yes.

THE COURT: On what basis did the School Board --

THE WITNESS: The retainnage is withheld to insure that the work under the contractor is being completed. If, for example, a contractor walks off the job then we have a right to use that retainnage to help us finish the cost of completion.

In this case because the retainnage that normally would hve helped us to complete the cost of the building was in escrow, in bonds, when the bonds were sold they came in at an amount less than the amount we had deposited in the escrow account for retainnage purposes, so we did not have the benefit of the full retainnage to use in our completion cost after Fabrizio walked off the job.

pgg 2

Fowler-direct

THE COURT: If you're going to get to your construction cost don't you have to compute the true construction? I have difficulty with this.

THE WITNESS: Your Honor, I would put the \$5,000 in the same category as our payments to Fabrizio & Martin. That is taxpayer money that was expended, that we no longer have. Some of the payments went to Fabrizio & Martin and some went into an escrow account.

When the escrow account came back to us it was \$5,000 less. That amount of taxpayer dollars had been lost.

Q Dr. Fowler, the third group of MacNamee certifications and requisitions relate to extra work outside of the contract.

There are a group of five such requisitions and certifications.

MR. YAVNER: I offer these in evidence.

MR. POWERS: I thought a question was propounded to Dr. Fowler.

MR. YAVNER: This is the third group.

MR. POWERS: Read back the statement.

(Record read.)

MR. YAVNER: Dr. Fowler has already been examined about this.

pgg 3

Fowler - direct

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THE COURT: He has identified those documents.

MR. YAVNER: He has not but he said before that there was a group -- I think what he said was that there were three different groupings of requisitions and certifications.

I will ask the question again.

MR. POWERS: One thing, if I understand, I didn't hear Mr. Yavner clearly but I thought he indicated that no extra work outside of the Fabrizio -- or he prefaced it by saying there was no work contained therein that was not contained in the Fabrizio contract.

Was that your statement?

MR. YAVNER: No.

MR. POWERS: That was myobjection. I didn't hear you correctly then.

THE COURT: Continue, please.

Q I show you a group of certifications and requisitions with the heading Extra Work Outside of Contract.

are these the documents to which you referred earlier in your testimony as being part of the general payments to MacNamee?

A Yes.

MR. YAVNER: I offer these in evidence.

MR. TRAGER: I object to them.

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Fowler- direct

THE COURT: These are all items involving the completion of the new school?

THE WITNESS: Yes.

THE COURT: They will be received.

(Defendant's Exhibit 89A through F received in evidence.)

Q Dr. Fowler, you have already described 89A for the record.

Unless there is more you want to add to:that,
go on to the others. I'll put them in sequence for you.

A 89B is a certificate of the architect John C.

Harkness dated June 13, 1966, to Daniel F. MacNamee &

Company for work outside his paving and curbing contract

of \$3,101.94.

Exhibit 89C, a certificate of the architect dated July 19, 1966 to Daniel F. MacNamee for the same extra work, \$5,274.88.

A certificate of the architect dated August 18, 1966, Exhibit 89D, authorizint payment to Daniel F. MacNamee & Company for extra work, \$4,716.06.

Exhibit 89E dated September 16, 1966 to Daniel F. MacNamee for extra work, \$4,225.04.

Exhibit 89F dated December 14, 1966 to Daniel

F. MacNames for extra work, a final payment, in the amount

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pgg 6	Fowler- direct	167
of \$2,004.31,	making a total payment of \$20,043.02.	

- Q Dr. Fowler, was the Bradhurst site development contract part of the complex of the Fabrizio contract?
 - A Yes.
- Q Do you have with you the similar requisitions and certifications for that contract?
 - A Yes.
- Q Dr. Fowler, you have handed me a group of seven documents, each consisting of requisitions from Bradhurst Site Construction and certification by the architect in relation to what is described as site contract.

THE COURT: Do you know how much these total?
THE WITNESS: Yes.

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4a	am	gtg 1	Fowler-direct	168
	2	Q	What is the total?	
	3	A	\$29,329.	
	4		MR. YAVNER: Your Honor, I offer these in e	vi-
	5	dence.		
	6		THE COURT: Mark them and have them identif	ied and
	7	then offe	er them.	
кx	8		(Defendant's Exhibits Nos. 90A through 90F,	re-
	9	speci	tively, marked for identification.)	
	10	Q	Dr. Fowler, I had put a question to you abo	uŧ
	11	these doc	cuments before they were marked for identifi	
	12		now marked 90A through 90F, and these are t	
	13		s about which you gave your answers?	
	14	A	Yes.	
	15		MR. YAVNER: I now offer them, your Honor.	
	16		MR. TRAGER: Your Honor, may I have voir d	ire
	17	on this?		
	18		THE COURT: Yes.	
	19	VOIR DIR	E EXAMINATION	
	20	BY MR. TI		
	21	0	Mr. Fowler, did you approve these requisiti	one?
	22	A	I am not sure I understand what you mean by	
	23			₫þ-
	24	prove.	Approve for what purpose?	
	25	0	Did you approve the requisition for which t	nese
		payment '	vouchers were issued?	

1	gtg 2 Powler-direct 16
2	A I received them and approved their being placed
3	in the agenda for Board of Education approval, yes.
4	Q But did you approve the requisition itself, the
5	contents of it?
6	MR. YAVNER: I will object to that. There is no
7	showing that it was the responsibility of this witness
8	to do any such thing.
9	
10	THE COURT: Then why do you object to it? He
11	can testify to it. He can ask the question.
10	Overruled.
12	A Mr. Trager, I am not sure I know what you mean
13	by approve.
14	O I have a requisition and a voucher and I am ask-
15	ing you whether you approved the enumerated items of work
16	for which you were asked to issue a voucher.
17	Did you approve the requisition?
18	A May I describe what happened and then in re-
19	sponse to your question?
20	O No. I am asking you to answer that question.
21	A Yes, I approved it.
22	O You approved the requisition?
23	A Yes.
21	Q On each of these items that are embraced?
25	A T approved the regulation

1	gtg 3 Fowler- direct 170
2	Q Was that your function, Dr. Fowler?
3	THE COURT: That is not the point for you on the
4	voir dire. He said he approved them. That is probably
5	a surprising answer, but you have got it.
6	Q Dr. Fowler, do you know whether the work was per-
7	formed for which you approved the requisition?
8	A. Of my own knowledge?
9	Q Yes.
10	A No.
11	MR. TRAGER: I object to the admission of these.
12	MR. YAVNER: A question, your Honor -
13	THE COURT: The objection is overruled. Let us
14	proceed.
15	MR. POWERS: If I may, in addition to the running
16	objection, your Honor, by way of the method, the testimony
17	being put in, I don't know whether I have another objection
18	because I don't know what the contract was, whether it
19	was a unit price or a time and material or what have you.
20	I just don't know.
21	THE COURT: You can ask on cross-examination.
22	(Defendant's Exhibits No. 90A through 90F, re-
23	spectively, were received in evidence.)
24	Q Dr. Fowler, I hand you this group of documents
25	90A, B, C, D, E and F, and ask you to describe each of them

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as you did before.

A Exhibit 90A is a certificate of the architect

John C. Harkness, dated May 10, 1966, certifying that

Bradhurst Site Construction Corporation is entitled to
a first payment of \$2,925. Attached to the certificate
is a claim for and supporting bill from the company.

90B is a similar certification from the architect, dated June 16, 1966, authorizing payment to Bradhurst Site Construction Corporation in the amount of \$5,766.75, together with supporting material.

90C a certificate of the architect, dated July 19, 1966, certifying that Bradhurst Site Construction Corporation is entitled to a third payment of \$7,594.20, together with supporting materials.

Exhibit 90D has two separate thins, two requisitions in it stapled together.

- Q Are they both related to Bradhurst?
- A Yes.
- Q Then suppose you describe them together.
- A The first is a certificate of the architect dated September 21, 1966, in favor of Bradhurst Site Construction Corporation for a fourth payment in the amount of \$4,517.55. Also in this exhibit is a certificate of the architect dated November 14, 1966 to Bradhurst Site Construction

Corporation for a fifth payment of \$4,316.40, together with supporting materials.

90E, a certificate of the architect dated January 6, 1967 to Bradhurst Site Construction, a sixth payment of \$1276.20, together with supporting materials.

Again, in this 900 there are two. The first is a certificate of the architect dated May 24, 1967, certifying that Bradhurst Site Construction Corporation is entitled to a seventh payment of \$1,466.45, together with supporting data. Also in 90F is a certificate of the architect, dated May 24, 1967, certifying that Bradhurst Site Construction Corporation is entitled to a final payment of \$1,466.45, making a total payment to Bradhurst Site Development Corporation of \$29,329.

- O Was that final payment also the retainnage to Bradhurst?
 - A Yes.
- O Dr. Fowler, was a clerk of the works employed throughout the performance of the Fabrizio contract?

THE COURT: Was a what?

Q As a clerk of the works--

THE COURT: A clerk of the who?

MR. YAVNER: The clerk of the works. That is a technical term.

1	gtg 6 Fowler- direct 173
2	THE COURT: I didn't hear what you said.
3	MR. YAVNER: That is a technical term used in the
4	construction industry.
5	THE COURT: I was trying to understand you.
6	A Yes.
7	Q And was one employed throughout the completion of
8	the contract?
9	A Up to the last month or two.
10	Q Did the School Board incur additional cost for
11	the clerk of the works in connection with the completion
12	of the contract?
13	A Yes.
14	Q How much were those additional costs?
15	MR. POWERS: Objection, your Honor. This is lead-
16	ing and there is no foundation laid for these questions.
17	THE COURT: Mr. Powers, Mr. Yavner has been lead-
18	ing since he started his examination. You are very late
19	in making an objection on that ground.
20	MR. POWERS: Your Honor, I have been trying to
21	object as soon as possible.
22	THE COURT: You will get counsel to acquiesce in
23	that.
24	The question is whether a clerk of the works was
25	employed for the completion of the school. I think in

1	gtg 7 Fowler- direct 174	
2	order for me to understand it you will have to make some	
3	further inquiries as to what job he performs and his	
4	function.	
5	I don't understand what a clerk of the works is.	
6	Q Dr. Fowler, will you explain, please, the func-	
7	tions and duties, responsibilities, of the clerk of the	
8	works?	
9	THE COURT: Just briefly enough for me to under-	
10	stand it.	
11	THE WITNESS: The clerk of the works is the owner's	
12	representative on the site. He functions with the archi-	
13	tect to be sure that the building being built is the build-	
14	ing that is asked for in the specifications.	
15	If there are problems, if he feels, for example,	
16	cement has not been poured correctly, then he might call	
17	the architect in and make a determination as to whether the co	on
18	tractor is, in fact, doing the construction in accordance	
19	with the requirements under the specifications and plans.	
20	THE COURT: I see.	
21	Now I understand it.	
22	MR. YAVNER: Would you repeat my last question,	
23	please, to which objection was taken.	
24	(Record read.)	
25	MR. POWERS: I objected to the question before	

cost.

the last, whether the School Board incurred additional

Mr. Yavner is, in effect, testifying and I don't know what he means by additional cost.

This should come from the witness, your Honor. I haven't objected to the leading questions because I want this thing to proceed along, but you get to a point where I think you have to object.

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THE COURT: The objection is sustained. cerh

I think, Mr. Yavner, if the collection of the works is a part of the construction cost incurred by the School Board, and I gather that it is, you may, of course, indicate, if you can, what those costs are.

But I doubt or at least, you haven't established that Dr. Powler, who I understand is in the nature of a fiscal officer and pays the bills or at least okays the payment of the bills--I don't think that you have indicated that he is in a position to tell us whether there were additional costs or not.

He knows, I suppose, the costs were paid and he can tell us what those items were, but whether they were over and above what might have occurred if the plaintiff had completed the work, I don't think he is in a position to do it.

At least it has not been indicated to me that he can do it.

MR. YAVNER: I thought that I had gone into that when I asked Dr. Fowler to describe his titles, but I would like Dr. Fowler to tell us now just what his duties and responsibilities were as assigned to him by the Board of Education in connection with the Fabrizio and Martin contract and the completion of it from the time of the walk out by

1	pge 2 Fowler - direct 177
2	Fabrizio.
3	A The clerk of the works was employed by
4	No, no, your functions.
5	A I am sorry
6	Q I am talking only about you.
7	What was your job assigned to you by the Board of
8	Education?
9	A During the period in which Fabrizio and Martin was
10	on the job, up until perhaps December of 1964, my position
11	was that of clerk of the Board of Education.
12	As a result of this I kept minutes of all meetings
13	and executed formal documents on behalf of the Board of
14	Education, these kinds of things.
15	After December of 1964, when we began having prob-
16	lems in the construction of the middle school, I was assigned
17	by the Superintendent and the Board to handle the administra-
18	tive functions, any and all of them, that were in any way con
19	nected with the construction of the middle school.
20	Q Can you expand on that?
21	Who else, if any, had administrative responsibility
22	for the supervision for the Board of Education's supervision
23	and control over the work of anybody connected with the middl
4	school?

MR. TRAGER: I object to the form of the question,

Fowler - direct

your Honor.

pge 3

MR. POWERS: Objection, too, your Honor.

THE COURT: I don't understand the objection.

MR. TRAGER: He is leading, your Honor.

THE COURT: He said who else had responsibility, as far as I heard.

MR. POWERS: It is what he added to that, because the definition--

MR. TRAGER: It is the way he embellished it, your Honor. He might ask him who else was connected with the construction.

THE COURT: All right, Mr. Yavner, I think that you are going to have to make your questions a little more appropriate. You have been doing a great deal of leading up until now.

Counsel haven't said anything about it, but now they are going to object. So it seems to me you ought to question the questions. This is your witness and ask the questions properly.

administrative responsibility over the middle school construction during three different stages, and I am going to give you the first stage first and ask for your answer and then give you the second stage.

1	pge 5	Fowler - direct 180
2		During the period from January of 1965 until I
3	left the	school district in 1970, I had those responsibilities
4	Q	Your title, Clerk to the Board you had that title,
5	you had s	said, Clerk to the Work?
6	A	I had it between July of 1963 and July of 1967.
7	Q	Does that constitute you an officer of the Board?
8	A	Yes.
9	٥	In addition to that title, did you have another
10	title wit	h the school district?
11	A	Executive Assistant to the Superintendent of Schools
12	Q	To your knowledge, Dr. Fowler, did the school dis-
13	trict emp	loy a Clerk of the Works during the construction of
14	the Fabri	zio contract?
15	А	Yes.
16	J.	Was that clerk paid out of school district funds?
17	A	Yes.
18		MR. POWERS: Objection, your Honor.
19		I will withdraw it.
20		THE COURT: The question was improper as asked.
1		The questions are leading. You know how to ask
2	questions	, Mr. Yavner.
3	Q	Who paid this Clerk of the Works?
4	A	Board of Education.
5	Q	What was the name of the Clerk of the Works?

1	pge 6 Fowler - direct 181
2	A During what period?
3	Q Give us the names of each and during each period.
4	A The first Clerk of the Works was Franklin Adams.
5	I need to refer to the accounting cards which would indicate
6	the payments to the clerks.
7	Q Are these the ones?
8	A Yes.
9	He was employed from the beginning of the job in
10	1964 to the summer of 1965.
11	He was then replaced by John B. Beardsley, who
12	served from the summer of 1965 until the summer of 1966.
13	2 And that was just about a month or so before the
14	job ended?
15	A That's correct.
16	What salary did Mr. Beardsley receive?
17	A Mr. Beardsley received a payment twice a month of
18	\$667.
19	What was the completion date of the Pabrizio contract:
20	A September 1965.
21	MR. POWERS: Objection, your Honor.
22	There is no contract in evidence and you cannot
23	sue on a contract. It has already been held.
24	THE COURT: Mr. Yavner keeps insisting on using
25 '	that phrase I think the proper question is what was the

1 pge 7 Fowler - direct 182 2 date that Fabrizio was scheduled to complete the school? 3 MR. POWERS: Even there, with all due respect, your Honor, I think the question is how long should it have taken 4 5 to complete the school, not necessarily a date that was put 6 in the contract, because that date that might appear in the 7 contract is something determined by the architect initially 8 without any changes in the work or anything. 9 You have to take into consideration when you have 10 a contract like this and you have changes which increase the length of time, that contract date may mean absolutely nothing in 11 12 reality, and requests for extensions of time are normally 13 made and they may not be granted, so all of these factors have 14 to be taken into consideration. 15 THE COURT: If the date that is given is not 16 appropriate, you can find out from the witness. 17 In any event, that is the question that you can ask. 18 When was Pabrizio scheduled to complete construction of 19 the middle school? 20 September 1, 1965. 21 How much did you pay to the Clerk of the Works up to 22 September 15, 1965? 23 THE COURT: What difference does that make? Is that 24 amount of money if you employ a Clerk of the Works in construc-25 tion you charge that to the contractor?

25 All right.

too good.

		1	pge 9 Fowler - direct	Ra.
		2	THE WITNESS: I can enumerate the payments.	~
		3	THE COURT: No, that is all right.	
		4	I accept the \$15,000.	
end	4b	5		
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take 5a	1	pge 1 Fowler - direct 184
	2	Do you have the contract with the architects here?
	3	A I do not have it here. I am sure it is somewhere
	4	in the room.
	5	Q Did the architects receive a supervision fee?
	6	A A part of the contract with the architect called
	7	for them to provide supervision of the work and they were
	8	paid on that.
	9	Q What sum were they paid?
	10	A The only sum I can tell you without reference to
	11	the contract, is the sum they were paid for the extra super-
	12	vision, extra beyond when the school was supposed to have been
	13	completed and when it was actually completed.
	14	THE COURT: The architects supervision fee is not
	15	something that's ordinarily charged against a contractor, is
	16	it?
	17	MR. YAVNER: Yes, it is.
	18	THE COURT: No, no, it is not. I don't believe it
	19	is.
	20	If you have work and a man is finished on time
	21	MR. YAVNER: If he completes it on time, no.
	22	THE COURT: In the most liberal interpretation,
	23	what you can legitimately claim is in fee you paid for super-
	24	vision beyond the time when the work was supposed to be
	25	
		finished. That figure, I gather, Dr. Fowler has.

1	pge 2	Fowler - direct 185
2	Q	State that figure.
3	A	There are two figures involved. For the extra
4	supervis	ion between April and October of 1966 it was \$5,706.16.
5		Then the architect's basic fee, based upon the con-
6	tract was	s also increased and that was the amount paid is
7	\$17,681.	
8	Q	Is this a bill from the architect and a letter
9	accompany	ring it?
10	A	Yes.
11		MR. YAVNER: I offer this in evidence.
12		THE COURT: They cover the period in question,
13	from Sept	cember of 1965 to completion?
14		THE WITNESS: The bill is a summary of the total
15	job.	
16		THE COURT: That will be received.
17		(Defendants' Exhibit 91A and 91B marked received
18	in eviden	ce.)
19		MR.POWERS: Note my objection to the documents just
20	admitted	in evidence, your Honor.
21	2	Describe briefly these documents.
22		THE COURT: The documents have already been described.
23	5	How much is this bill for?
24	λ	Exhibit 91B is for \$17,681.43.
25	O.	Is part of this bill for extra supervision occurring

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1	pge 3 Fowler - direct 186
2	during the period April to October of 1966?
3	A The bill from the architect is rendered in such
4	a way that there is a total cost and then a total payment to
5	date and then the payments are applied against the cost to
6	determine the amount of this payment.
7	This bill, Exhibit 918, indicates that the archi-
8	tect acknowledges payment for extra supervision already paid
9	in the amount of \$5,706.16.
10	Q I don't understand how it was paid before he billed
11	for it.
12	A It had been billed previously. This is a summary
13	bill. This was the last bill submitted by the architect.
14	O Did you pay any insurance premiums for the period
15	between October 1965 and October 1966?
16	λ Yes.
17	Q How much were they?
18	A paid an additional year's premium of \$2699.61.
19	Q Do you have a bill for that?
20	A I have the accounts ledger card indicating payment
21	and check number and date.
22	MR. YAVNER: May I have this marked for identifica-
23	tion, please?
24	(Defendants' Exhibit 92 marked for identification.)
5	MR. YAVNER: I offer this in evidence, a distribu-

22,

187

when work but then it was necessary for us to pay an extra

year's premium while the construction continued during the

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end 5a

368a pge 5 Fowler - direct 1965-1966 period. THE COURT: The document that is being offered --That represents the premium for that period of time for that liability insurance. MR. TRAGER: It does not say that at all. MR. POWERS: In addition I have not seen the policy. I don't know what the policy is for, what it covers, or anything of that nature. I object. THE COURT: Let me see that. MR. TRAGER: There's a furniture rider on that, as a matter of fact. (Pause.)

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Was this document prepared in the regular course of business at the School District?

A Yes .

pgg 1

Which division prepared it? 0

The business office.

There is a handwritten statement here reading Q Furniture and Equipment, with an amount of \$74.25, also in handwriting next to it.

What does that item mean?

This is in the handwriting of the person who operates the accounting machine. It means that forms of maintaining the balances, the total balances on the Middle School account, a transfer was made from another account section called Furniture and Equipment to the insurance card in order that this payment oculd be made without leaving a credit balance of \$74.24.

- In other words, to have enough money to pay it? Q
- That is correct.
- Is there anything on this ledger sheet that indicates that this particular premium is for the particular purpose that you describe?

The payment is to the insurance committee, Central School District No. 2, which is the local group of agents who carry our insurance, and it is a check No. 108 made

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pgg 2 Fowler-direct 190

out in August of 1965, which of my own knowledge I know was for the purpose I have described.

MR.YAVNER: Your Honor, I repeat my offer of this card in evidence.

THE COURT: I think Dr Fowler's testimony that he paid for it, that is sufficient.

Q So it is perfectly clear for the record, Dr. Fowler, you authorized a payment for an extra year's premium to the insurance company?

- A Yes.
- And in the amount that you have stated before?
- Yes. In the amount of \$2,699.61.

THE COURT: That covered September of 1965 to the conclusion.

- Insurance for another year of construction, yes, your Honor.
- O Did you have to pay any extra sums to any others in connection with that additional year of construction?
 - A Yes.

To quite a number of people. A total amount of \$85,051.29.

- Have you prepared a schedule of these payments?
- The schedule is in the supplemental answer.

I have my own notes here and I have each of the claim forms.

O In connection with Julius Watsky, did you make a payment to that firm for the year 1965-1966 from September?

A My notes are not in the way of your question.

We made several payments to Julius Watsky the

first of which was on March 30, 1966 in the amount of

\$5400; the next was on April 27, 1966, in the amount of

\$3600; and the third of which was in March, March 8,1967,

in the amount of \$5800.

0 What were these payments for?

A He was a sub-contractor for Fabrizio & Martin.

The first payment of \$5400 on March 30, 1966 was a direct payment for work which we authorized him to continue on in the Middle School during the period just after Pabrizio walked off the job.

As I believe Mr. Crane described yesterday, we were in a situation where because the roof had only been partially done there was danger to the structure of the building and so we called Mr. Watsky and asked him if he would come in and finish a portion of the job until such time as we could let a completion contract.

What was the second payment that you described?

A The second payment was related to the first and related to the agreement which we-- the three-party

our direction. The work which he did in February was still

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Fowler-direct

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as a sub-contractor for Fabrizio & Martin, for which he had not been paid by Fabrizio & Martin.

- And the Board paid that? Q
- Yes. The Board paid him. A
- The first one was \$3400 and that was February? 0
- The first payment which I referred to was \$5400 on March 30. This was for work done by Watsky during March at our direction. It was \$6,000 worth of work. He was paid \$5400 on account of the 10 per cent retainnage.

The second amount --

- This was after Fabrizio had left the job?
- A That is correct.

The second amount was in accordance with the three-party agreement entered into with Watsky. That was for \$3600 representing his claim of having performed \$4,000 worth of work during the month of February for Fabrizio & Martin, and his claim that he had not been paid that amount of money and in accordance with the agreement we executed with him we agreed to pay that amount, so we paid \$3600, 90 per cent of that amount, on the 27th of April.

And then was there a third amount that you men-

Fowler-direct

3 tioned?

gtg 1

A Yes. The third payment also in accordance with this three-party agreement, was for \$5800, which represented the total retainnage of Julius Watsky. \$4800 was retainnage that Fabrizio & Martin withheld and \$1,000 of it was retainnage which we had withheld from those two payments I have just mentioned, making \$5800 the amount of the check.

Q May I see the document to which you have been referring?

A Yes (handing).

MR. YAVNER: May I have this marked for identification.

(Defendant's Exhibit No. 93 marked for identification.)

Q Dr. Fowler, what steps did the Board of Education take to complete the Fabrizio contract?

A We were in a very difficult position because we had a building partially done and the question was whether a contractor would come in and looking at the building and looking at the requirements of the specifications and plans give us a definitive price on what it would cost to complete the building, so the Board of Education directed that we invite, and we did so by public notice, prospective bidders to come to the site and to examine the site and to enter into

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gtg 2

discussions with us about the work to be completed.

Several prospective bidders did that and they explained to us what they considered their problems to be and we then put together a proposal inviting bids based on a number of assumptions.

These assumptions included the availabilityfor example, they included the availability of Fabrizio &
Martin's sub-contractors to continue their contracts with
the new completion contractor.

Q What specific arrangements, if any, did you make in connection with the Fabrizio subcontracts?

A We received a list from the architect of all of the subcontractors to Fabrizio & Martin and we contacted each of them.

We contacted them by mail and asked them to report certain information on the amount of their contract and the amount that they had been paid and the amount of work which they had done.

We also met with them personally to iiscuss the possibilities of their continuing on with this work.

As a result of the information which they supplied us, we then proposed a three-party agreement with the subcontractor, with the new completion contractor, and with the Board of Education.

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gtq 3 Fowler-direct

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This agreement provided that the subcontractor would finish his work as it had been outlined in his contract with Fabrizio & Martin at the stated price so, in effect, the subcontractor then was a built-in subcontractor for the new completion contractor.

When the completion contractor decided to submit his bid, he knew that in the case of Watsky, for example, who was the roofer, he knew what his roofing costs wenderto be because they would be a part of this agreement that was in the bidding documents.

I show you 93 for identification.

Is that the three-party contract with the Watsky firm?

- Yes, it is. A
- And is this the original copy signed by all the parties?
 - A Yes.

MR. YAVNER: I offer this in evidence, your Honor.

THE COURT: What is the purpose of it?

You are showing damages. What is the purpose of the contract?

MR. YAVNER: Partly, I think I have been anticipating an argument which had been made prior to the trial on various things.

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2	gtg 4 Fowler-direct 197
	I think that the testimony that Dr. Fowler has
3	given shows that we did have to make certain payments.
4	I would like to ask Dr. Powler another question
5	in connection with that.
6	Q Dr. Fowler, of the three payments that you men-
7	
8	tioned, was any of them over and above the completion
9	cost required by this three-party contract, which has
	been marked 93 for identification?
10	A No, they are all provided for in that agreement.
11	Q Were any of those payments extra costs in the
12	completion of the job?
13	
14	A I am not sure I understand the words "extra costs."
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16	O Did these payments constitute an addition to the
17	amount of the original Fabrizio contract?
	A To the work required in the Fabrizio & Martin
18	contract?
19	Q To the work required and the dollar amount.
20	Did they constitute an addition to the dollar
21	amount of Fabrizio's contract?
22	
23	A I don't understand the question.
	Q I will withdraw it.
24	Dr. Fowler, under this three-party contract,
25	Exhibit 93 for identification, how much more was supposed

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leading the witness.

1 gte 1 Fowler - direct 200 2 MR. YAVNER: Would the reporter read the last phrase 3 or so of Dr. Fowler. 4 (Record read.) 5 What did the completion contract provide with 6 respect to these particular payments? 7 A I would need a copy of it. 8 THE COURT: Am I to understand that these are iters 9 of sub-contractors with Fabrizio and Martin work that they had 10 subcontracted that was covered by the amount of money that they 11 were supposed to receive and that when they left the job the 12 Board paid money directly to those subcontractors? Is that what 13 you are trying to bring out? 14 MR. YAVNER: Yes, your Honor. 15 That is the fact, isn't it, Dr. Fowler? 0 16 A Yes. The Board paid directly to the subcontractor. 17 THE COURT: It seems to me you are struggling 18 with it. It seems to me, why don't you do that if you want 19 to bring it out. Just do it by asking those questions and 20 bring it out. 21 Dr. Fowler, did the Board complete the subcontract 22 payments in behalf of Fabrizio and Martin to any of Fabrizio 23 and Martin's subcontractors? 24 MR. TOPLITZ: Objection, your Honor. Again, he in

1	gte 2	Fowler - direct	201
2		THE COURT: That is true.	
3		All right. We are going to take a recess unt	il
4	2 o'clock		
5		How much more time are you going to take on	this
6	case with	your case?	
7		MR. YAVNER: I think that Dr. Fowler is prob	ably
8	going to	take the rest of the day.	
9		THE COURT: How much time are you going to t	ake on
10	your case	7	
11		Does that mean that Dr. Fowler will complete	your
12	case?		
13		MR. YAVNER: I am sorry. No.	
14		I am not certain and it is one of the things	I wil:
15	be deciding	ng this afternoon, when I am calling in Mr. H	arknes
16	of the are	chitectual firm, and I will be able to give y	ou an
17	answer th	is afternoon.	
18		You have already ruled that you won't permit	the
9	witnesses	from the other prime contractors who are sui	ng us
00	for delay	damages. At least, that was my understanding	g.
1		THE COURT: I don't get that. You are telli	ng me
2	something	I am not sure I ruled on. Let me hear it ag	ain.
3		What do you understand?	
4		MR. YAVNER: I understood yesterday, and I h	оре
5	that I am	wrong, that you had ruled that you would not	hear

witnesses from the other three prime contractors or the two subcontractors who are suing us for delay damages caused by Fabrizio.

THE COURT: That's correct.

MR. YAVNER: And hear them on that subject, of course.

THE COURT: That's correct.

MR. YAVNER: In view of that, I--

THE COURT: Frankly, I don't know how much cross examination it is going to take with Dr. Fowler, I suppose it may be extensive, but it seems to me that a number of these items, I am going to want you to organize them and telescope them.

Mr. Yavner, we are struggling with very simple items. The item is Dr. Fowler has testified that it cost the Board two million seven hundred and some thousand dollars to complete the construction of the middle school and I gather that these various items that you are bringing out or want to bring out are items that will total that cost.

MR. YAVNER: That's correct.

THE COURT: But, you know, if the School Board had to pay the subcontractors, which was an obligation that Pabrizio assumed, then that is a very simple thing to do.

Let us get the figures out in terms of that and

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anything else that the School Board had to do in terms of cost.

That is all you can allege in terms of damages, isn't it? What did it cost you to build the building? That is the most you can allege damages, isn't that right?

MR. YAVNER: Yes.

It was my understanding from the information given to me previously by Dr. Fowler that, for example, for these two subcontractors these costs were over and above what they were supposed to be getting from--

THE COURT: That is beside the point in any event.

If the general contractor gets two million or whatever dollars and he, therefore, agrees that he is parcelling out work and he is paying part of that to subcontractors and then you pay them that money, which you have to pay to the subcontractors yeurself, then it seems to me that is part of what you are going to try to allege are your damages.

It seems to me it is a very simple way to get it out and I would suggest that you do that and I would also suggest if you have any additional witnesses after Dr. Powler you get them here, because I am going to ride hurd on all counsel.

This trial, as I told you before, is going much too slowly. I don't have that much time. I have time for you

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to get your case in, but I expect counsel to come here prepared to try the case and to move with it expeditiously and not to drag a trial out needlessly.

I am ready to sit here at night and Saturday, too, to get this case completed, but I want you to move with it.

All right, we will adjourn until 2 o'clock.

(Luncheon recess taken.)

AFTERNOON SESSION

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2:10 p.m.

CHARLES W. FOWLER, resumed.

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DIRECT EXAMINATION

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CONTINUED BY MR. YAVNER:

In addition to the cost for completing the middle school to which you testified this morning, did you have any

other costs?

A Yes.

There are other costs which I have listed in a

schedule totalling \$85,051.

Q May I see that?

A Here it is. (Handing.)

MR. YAVNER: May I have this marked for identifi-

cation.

(Defendants' Exhibit 94 marked for identification.)

Is this Exhibit 94 for identification the schedule

of additional disbursements you had with respect to the com-

pletion of the middle school?

Yes, it is.

THE COURT: Additional disbursements? In addition

to those --

That I testified to this morning with the exception

of Watsky, your Honor.

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Powler	-	direct
LOWIEL	-	direct

On this schedule are there several items about which you did give item this morning?

A Yes. The payments to Julius Watsky and to Peter Gisondi.

MR. YAVNER: I offer it in evidence.

THE COURT: No sense in duplicating that.

MR. YAVNER: I didn't hear you.

THE COURT: There is no point in having duplication. He has already testified about some of those. Either you would limit them from that document or else take them out of the other exhibit.

MR. POWERS: Before having the document marked, your Honor, I think Mr. Yavner chose a course of action to take earlier this morning in introducing the testimony with respect to these various items and now it appears to me as though he's just going to put in the schedule and say "Here are my costs."

I object to this. It is a continuation of the objection I raised this morning with respect to some of the other items. It is putting the cart before the horse. I am being subjected to cross examination on his items of proof where he sould put the proof in directly. He has started that way.

MR. YAVNER: I listened to you this morning and you

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THE COURT: He has said, with a witness here, that these are items of cost that the school board was required to make in connection with the construction.

MR. POWERS: Without any background--

THE COURT: What kind of background? There is a list of the items on there. You can make an inquiry about that.

The point is it is not my function to tell Mr. Yavner how he should make his case. If he can't substantiate any of those items -- why should the Court be burd and with some of the items he's asserting here if there is no dispute about them?

If you are going to dispute them then of course he's going to have to be put to his proof.

He's indicating that this is a cost that the School Board had verified by documents. As far as I my whiterhad unless you can show the costs were not made and are not in

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made a prima facie case.

connection with the construction, then it seems to me he has

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I don't see why he should have to--if you are going to dispute the items already. You study the documents and dispute the items.

some of the items you are not disputing. You are not going to dispute some of the items that these were costs in the construction?

MR. POWERS: Some of the items have nothing to do with the construction.

THE COURT: He has not indicated that so far. So far this morning we had items that seemed to me to come out of cost. I don't know what is on that document. Look at it.

Do you want to challenge any particular items of the document? Do so.

1 pgg 1 Fowler-direct 1b pm 208 2 MR. TRAGER: May we take an exception? 3 Once the document is in evidence it can't be 4 taken out of evidence. 5 THE COURT: He has made a foundation. This man 6 is on the witness stand. He has indicated he was in 7 charge. He is verifying by saying these were the items 8 of cost. 9 MR. TRAGER: The builden has been shifted. Once 10 it s been in evidence we have to get it out of evidence. 11 THE COURT: It has not been shifted. The ques-12 tion about it is if you want to challenge any items that 13 he has indicated, you may do so. 14 Let's proceed. 15 MR. TRAGER: I take an exception to the ruling. 16 THE COURT: Your exceptions are always reserved. 17 (Defendant's Exhibit 94 received in evidence.) 18 Dr. Fowler, how did you finance the cost of 19 completing the -20 MR. TOPLITZ: I object to that. 21 THE COURT: Overruled. 22 At the time of community approval of the con-23 struction of a school there was approval given to issue 24

After the walk-off of Pabrizio & Martin, it

3.8 million dollars in bonds.

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became apparent there would not be sufficient funds.

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Board of Education authorized the issuance of \$250,000 in additional bonds to cover these costs. THE COURT: On looking over Exhibit 94 there

are several items here I don't understand. I don't understand why these items are involved in construction. I can't read it very well.

Overtime secretarial services? Various items on that. Photographs. 24-hour-a-day guards. Dinner. Rental for toilets. Messenger.

MR. YAVNER: We can explain them all, your Honor.

THE COURT: I think you better.

MR. YAVNER: Shall I interrupt this line of questioning and come back to that?

THE COURT: You can finish that line of questioning and go back to it. It is all right with me.

(Record read.)

Because we were uncertain as to whether or not the bonding company would in fact come in and assume the cost; rather than sell the bonds immediately the Board issued bond anticipation warrants in the initial year and in the second year in the amount of \$250,000. Then they paid off some principal and continued to issue warrants

pgg 3

to recapitulate in 1967-1968 and 1967-1968 bonds in the principal amount of \$250,000; in 1968-1969, bonds in the principal amount of \$240,000 -- excuse me, I don't mean bonds, but I mean warrants, bond anticipation warrants. In 1969-70 bond anticipation warrants in the amount of \$230,000.

When you are repeating the figures does this mean you had paid off the bonds each year and then issued new ones?

A We paid off the warrant each year plus the interest and then renewed it.

1970 - 1971 bond anticipation warrants in the amount of \$220,000.

THE COURT: What was the actual cost?

THE WITNESS: That would be the interest cost for the borrowing.

THE COURT: Proceed.

A Those were the five years of bond anticipation warrants; total interest cost over those five years was \$49,049.

Then in May 1971 when it became apparame that we were not immediately to recover any of the costs the Board sold bonds, took them out for bid, the interest rate was bid at 2.5 per cent and those bonds will be paid off over

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1	pgg 3a Fowler-direct	210a
2		2100
3	a 26-year schedule.	
4	The interest cost on the remaining \$210,000	
5	spread over that 26-year period is \$125,749.	
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211

Were the bonds that were issued in 1971 in that amount of \$210,000?

A No, the total amount of the issue in 1971 was one million-- \$1,910,000 of which, and the advertisement for the issue indicated this, \$210,000 was--

MR. TOPLITZ: I am going to object to anything that happened in 1971. He said he left the employ in 1970. He is not capable of testifying as to what happened in 1971.

What is the basis for your information, Dr. Fowler?

It is the information received from the present school business official in Mt. Kisco.

THE COURT: Have you noted your appearance?

MR. TOPKITZ: Yes, sir.

THE COURT: Pardon me?

MR. TOPLITZ: Pardon me, your Honor.

THE COURT: I don't have an appearance for you so I don't know what to call you.

MR. TOPKITZ: Yes. I have appeared, your Honor. I am co-counsel.

THE COURT: What is your name?

MR. TOPLITZ: Toplitz, T-o-p-1-i-t-z, your Honor.

THE COURT: I think, Mr. Toplitz, you are right.

MR. YAVNER: May I ask one more question in

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1	gtg 2 Fowler-direct 212
2	connection with this?
3	THE COURT: Don't weste any time with the witness.
4	If you're going to have anything about what the School
5	Board has done since Dr. Powler has left, you have some-
6	body who is an official to testify to it.
7	
8	that you left the School
9	Board service, I think the figure you gave was \$49,000 and something in interest?
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11	A That was the figure for the bond anticipation
	warrants.
12	Q Was all of that during the period that you were
13	with the School District?
14	A No.
15	Q How much of it was not?
16	A The last year, 1970-71, amounting to \$10,120.
17	Q Dr. Fowler, I call your attention to Exhibit 94.
18	There is an item here called Photographs in the amount
19	of \$240.
20	Will you tell us what that refers to?
21	I show you the item here (indicating).
22	A This was for 26 photographs taken of the Middle
23	School on April 15, 1966 and April 18, 1966 and for 14
24	photographs taken of the Middle School under construction
25	on April 8, 1966 and for 14 additional prints of these
. 1	and for it additional prints of these

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photographs.

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The photographs were taken to show the degree of completion of the school.

Fowler-direct

Were they taken relatively soon after Fabrizio left the job?

He left in March and these were taken in April of 1966.

THE COURT: It is very difficult for me to see how a photograph is going to be an item of damages in construction costs. It is very difficult for me to see that but go ahead with the examination.

MR. YAVNER: Your Honor, in the construction industry there is a requirement that photographs be taken monthly during the course of construction just so it is possible to tell what really did happen long after the job is over.

When a contractor leaves a job it becomes doubly necessary to take photographs so that one can establish through that at least the state of completion.

THE COURT: You are going to have to show me either by some reference to a principle, which you possibly will do in post-trial briefs, or someone else that photographs are a legitimate item of costs here.

But let's proceed.

Fowler-direct

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Why don't you do this to save time:

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Why don't you have Dr. Fowler go down each of those items and explain what they are, because I am interested in a number of them.

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THE WITNESS: The first two items I have testified to already, Watsky and Gisondi.

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The third item is a reimbursement to our clerk of the works to replace locks that were broken off of trailers on the job.

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The next item is, again, a photograph, expenditure for photographs.

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If I might say, the Board felt in connection with the photographs that at some point it might be necessary to establish the degree of construction at the time

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Fabrizio left the job.

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THE COURT: I know, but that has nothing to do with construction costs. That may have something to do with some

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litigation that might be involved here, but we have not

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reached that point. We are trying to reach thepoint of construction costs.

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Go ahead.

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THE WITNESS: All right.

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The next item is to Interstate Security Service for guard service. The locks were replaced because of a

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gtg 5

break-in on the site, which became the subject of a trial.

THE COURT: You didn't have guards before?

THE WITNESS: No, we did not.

The contractor bore the responsibility for safeguarding the site. If he chose to hire a guard that was his responsibility.

THE COURT: You had no problem in breakage and breaking while Fabrizio was constructing the facility, is that correct?

THE WITNESS: That is correct.

THE COURT: All right.

THE WITNESS: In this particular break-in, the person accused of the break-in was someone who worked for Fabrizio and Martin.

Port-O-San was the rental of chemical toilets so that the men who were on the site would have facilities and this is something that Fabrizio had provided and which it was his responsibility. We provided it in his absence.

time secretarial services. Again, prompted by the walkoff of Fabrizio & Martin there was a considerable overload
on the work of secretaries in the offices so we could prepare the documents so we could go out again and re-bid the

1	gtg 6 Fowler-direct 216
2	Middle School construction, preparing certain papers in
3	connection with that rebidding, typing advertisements.
4	That is what these payments refer to.
5	Next is to Arthur Lorenzo & Sons. He was a sub-
6	contractor.
7	Is that sufficient? That is similar to Watsky
8	and Gisondi and we went through all that this morning.
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THE WITNESS: Hammond Electric, to maintain heat in the three buildings, again, this is a responsibility of the general contractor, Pabrizio and Martin. We asked Hammond directly to undertake that.

Ceco Corporation is a subcontractor.

Cochrana Glass is a subcontractor.

The COURT: All right.

Gisondi again, Watsky again, more photographs, more quards.

Legel advertisements

Les Gettis Inc., in the newspaper calling for inspection of the site by prospective bidders.

A meeting of the Board-expenses in connection with the meeting of the Board held to discuss how to proceed with the default.

More toilet rental, more overtime.

Messenger service, this is in connection with getting information from the subcontractors as to the amount of—what their contract was with Fabrizio, how much work they had done.

Again, we were in a terrible press for time because we had kids on a double session kind of basis, waiting the completion of this building, so rather than depending on the mail, we sent a messenger to the subcontractors to pick up these documents so that we could, again, prepare the bid on the reconstruction.

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More legal advertising, subcontractors, overtime.

THE COURT: It seems to me that perhaps if the Board had been as willing during the course of the period when Pabrisio was constructing the facility to spend money as they were afterwards, maybe this controversy wouldn't have developed.

MR. YAVNER: Your Honor, I don't know why you are saying that.

Counsel made a remark yesterday, but only counsel made a remark, and this was in connection with Crane's testimony, that there had been alleged delay in paying--

THE COURT: As I remember the testimen, there is no need for us to go into it now, but as I remember the testimony, Mr. Crame verified that there was a long time lag and that's all --

MR. YAVNER: That's right, but there was a reason for that.

THE COURT: Whatever the reason, the point is that there was the time lag.

Would you continue, please.

THE WITNESS: Yes, sir.

More temporary heat, a subcontractor, a subcontractor, a subcontractor, subcontractor. A payment to the architect for special services in which they came down on a number of occasions and tried to construct the necessary documents that

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would describe to a prospective bidder our state of completion.

THE COURT: That is in addition to the items that were introduced yesterday or this morning?

THE WITNESS: That's correct.

THE COURT: All right.

THE WITNESS: Outside their contract.

A subcontractor, another payment to the architect, the same item, subcontractor.

This was Bethlehem Steel Corporation. They were not a subcontractor, they were a supplier.

The person responsible for putting the steel up on the job had ordered the steel and we were contacted by them because there was an impending steel strike, but they would not deliver it to the site unless someone would assure them that the steel would be paid for, so we paid for the steel.

Again, messenger service, guard service, toilets, subcontractor, subcontractor, photographs, subcontractor, subcontractor, subcontractor.

All of the remaining items are subcontractors, except the last, which is the toilet rental.

There are two items I would like you to go back to,
Mr. Fowler. You mentioned one of overtime. Didn't that
refer to you?

Yes.

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Would you explain that in more detail, please?

This was in the course of preparing all of the documents for bid. The Board of Education asked me to provide whatever assistance I could to you as these documents were prepared and it required several nights of all night work extending over a several week period, and the Board of Education approved a payment to me for that overtime.

I also -- I think I was answering a question and I might have had one here in connection with legal services.

That's right, that is the next one I wanted to come 0 to.

Disbursement to Mr. Yavner for legal services in connection with the default in length of the completion contract, again, required literally a month and a half of work executing all of these agreements with the subcontractors, getting the materials ready so that it could be put out to bid, this kind of work.

THE COURT: All right.

May I see the document you were reading from in con-Q nection with the interest payments?

Yes. (Handing).

MR. YAVNER: May I have so much of that goes through the period 1970, in order, the first four payments shown on

	403a
1	gte 5 Fowler - direct 221
2	this, marked in evidence?
3	MR. POWERS: Objection, your Honor.
4	THE COURT: The objection is overruled.
5	(Defendants' Exhibit number 95 was received in
6	evidence.)
7	Are there any law suits pending
:	MR. TOPLITZ: Objection, your Honor, sir.
9	THE COURT: I haven't heard the rest of the ques-
10	tion. All I heard were, "Are there law suits."
11	I don't know what the rest of the question is so I
12	can't rule on it. I will have to hear the question.
13	Are there any law suits pending against the Board
14	of Education in connection with the completion of construction
15	of the middle school?
16	A Yes.
17	MR. POWERS: Objection, your Honor.
18	THE COURT: I don't know what the question means.
19	What do you mean?
20	MR. YAVNER: I will be glad to explain or I will
21	ask my follow up question.
22	the beauth suit against the Board of Educaion-

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Who has brought suit against the Board of Educaion-THE COURT: Are you bringing in those other law suits that we already ruled you couldn't bring in hefore?

MR. YAVNER: That's right. I just want to establish

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who they are, because we haven't got that on the record.

MR. POWERS: I don't think it matters who they are, your Honor. I think it is completely irrelevant.

THE COURT: I think so.

MR. TRAGER: I think you laid down the guidelines that he is entitled to testify as to construction costs.

I don't see how this is relevant at all.

THE COURT: I am going to rule it out.

You may make an offer of proof if you want, but I am going to rule it out.

You referred before to the fact that as a result of the delay you had to be on double session.

MR. TOPLITZ: Objection, your Honor. He is leading.
Ask him what was the result--

MR. YAVNER: I am repeating the statement that he made before.

MR. TOPLITZ: Did he?

THE COURT: I didn't hear that statement.

I heard him say that they were on double session and they wanted to have the school completed, but I didn't understand that people were on double session ebecause of the delay. They could have been on double session as far as I know because construction started.

MR. YAVNER: My recollection is that is what he said.

sents?

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A Exhibit 96 contains a claim form and supporting data from Fabrizio and Martin dated November 30, 1965 for payment of a total amount of \$139,056.49. Attached to thethere is a notation to release liquidated damages to Fabrizio and Martin in the amount of \$6450.

MR. POWERS: Objection, your Honor, with respect to liquidated damages. They fall into the category of the supplemental agreement and they are only charged by reason of the supplemental agreement. Obviously Mr. Yavner is trying to slip that testimony in when the Court has already ruled he's not permitted to do that.

MR. YAVNER: He's reading this.

MR. POWERS: It is not in evidence yet.

MR. YAVNER: Actually the notation means the opposite. The Board on a previous requisition had made a deduction of \$6400 as liquidated damages. On this payment they were giving it back and deciding they were not going to take--

MR. POWERS: He's testifying. I think the witness should testify.

MR. YAVNER: You made a statement as to what it meant.

MR. POWERS: Now he wants to testify about the liquidated damages himself. This is highly irregular.

MR. YAVNER: There is no need and I am perfectly

Martin.

A It is dated March 1, 1966. It is a payment of

\$6,000, made out to the order of John E. Hoy, Sheriff of

Westchester County. and it is paying an attachment that was

filed with the School Board on February 18, 1966 by Interna-

tional Mill Work Corporation against funds of Fabrizio and

2 what that represents?

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THE COURT: What is that.

MR. YAVNER: Exhbit 1. You had made several

references yesterday afternoon that indicate on the record

Q To whom is the check made out?

To the sheriff of Westchester County. A

MR. YAVNER: I offer this in evidence.

MR. POWERS: I object on the ground I don't know why the company filed a lien.

It may be because the school board didn't make payment to Fabrizio. However, your Honor, will rule that's a subject for cross examination.

THE COURT: I would assume that that's against Fabrizio.

Those two documents are received.

MR. YAVNER: The basic document, the Fabrizio document, is still merely for identification. I don't want to introduce it in evidence --

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1	pge 6 Fowler - cross 228
2	which is requisition number 22 of Fabrizio and Martin, could
3	you please tell me if there is an indication on that requisi-
4	tion as to the amount that had been previously paid to
5	Fabrizio and Martin?
6	A Yes. It indicates payment of \$2,146,131.91.
7	Does that accord to the testimonyyou gave earlier
8	on direct testimony on the supplemental answers to interroga-
9	tories?
10	A No. It does not.
11	Q Tell me how you account for the discrepancies?
12	A I read the wrong figure to you.
13	Q Go ahead.
14	I read the payment figure. The amount on here that
15	indicated that has been paid is \$2,120,756.91.
16	That's indicated as the amount previously paid.
17	A That's correct.
18	2 No funds were paid to Pabrizio and Martin subs
19	to that requisition 22 being made out; is that correct?
20	A That's correct.
21	Q Is there a difference of what?
22	A \$6,000.
23	2 96,000.91.
24	A No. Just \$6,000.
25	would you tell us please how you account for that

Fowler - cross

Mr. Yavner; you have a right to ask questions later.
Proceed.

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Powler-cross

Q Dr. Fowler, I show you Defendant's Exhibit 89B through 89F, concerning which you testified earlier to-day that those exhibits are the requisitions and certificates of payment concerning payments made to, allegedly made, to MacNamee Company for work performed subsequent to March of 1966, is that correct?

A That is correct.

O Are they not for work performed, labor performed, and materials supplied pursuant to a time and material contract?

A Yes.

Q Is it also a fact that there is no back-up to those requisitions or certificates of payment indicating exactly what men were employed on a particular day and the number of hours and the type and numbers of equipment and so forth?

A It is not attached here.

MR. POWERS: Your Honor, with respect to these particular requisitions, I make the same application as earlier and I don't think-- I think they were admitted into evidence prior to my having had an opportunity--

THE COURT: I thought I had already ruled on that.

MR. POWERS: You had with respect to two others.

It was my impression - but not with respect to these.

this project?

	414a
1	pgg 2 Fowler-cross
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3	I assume that your ruling applies to all of these?
4	THE COURT: Any of those documents that need
5	support are being admitted subject to production of the
6	questioned items.
7 8	O Who paid the clerk of the works?
	A The School Board.
9	Q Is it not a fact that the architect also paid
10	part of the cost?
11	A During which period of time?
12	Q Any period of time.
13	A This was a different arrangement. In the first
14	period of time when Franklin Adams was the clerk of the
15	works there was an agreement between the Board and the
16	architect that they would each pay half of the cost.
17	After Mr. Adams left the job and Mr. Beardsley
18	was hired, he was hired to be paid for solely by the
19	School Board.
20	Q When was that?
21	A When?
22	O Yes.
23	A I testified it was in the summer of 1965.
24	O Who was originally listed as the architect on
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Fowler-cross

- Originally? Listed where? A
- The Architects Collaborative.
- The Architects agreement was originally with The A Architects Collaborative.
- Do you know if it was licensed to do business as an architectural firm in New York?

A I don't believe this is relevant and material to the issues here.

MR. POWERS: I think it is relevant because we have an architect suppledly representing a school and the architect not being licensed to act in that capacity in New York State. It is certainly relevant to the action taken by the architect.

THE COURT: Are these architects representing the schools, Mr. Powers?

MR. POWERS: They were paid for the services rendered. They are the architects that certified all of the payments that were made to the various parties, certified the requisitions.

MR. YAVNER: That is an incorrect statement. It would be easier to let Mr. Fowler explain than for us to datate it and I withdraw my objection.

hande it.

The question was

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Fowler-cross

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Q Is Architects Collaborative licensed to practice architecture in New York State?

A It is my understanding that no firm is licensed to practice architecture in New York State.

Q I asked you if Architects Collaborative was licensed to practice architecture in New York State?

A No.

Were they the architects for this project who approved requisitions, approved change orders, directed what work was to be performed, et cetera? Is that correct?

A No.

MR. YAVNER: I object to that.

Or a representative of the Architects Collaborative?

MR. YAVNER: I object to the question because of the sequence in which it comes and it is not related to the previous question. It is entirely misleading.

I would have no objection to the question if put afterwards when this is developed.

THE COURT: This is cross-examination. You are overruled.

O You referred to a ledger card earlier with respect to the insurance.

Powler-cross

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I refer you to Defendant's Exhiit 92.

Tell me, please, what periods of time the policies that you testified about ran from and how long it ran? In other words, did the policies run from January 1965 to January 1966 or January 1966 to January 1967, or September of 1966 to September 1967?

- A I don't have the exact dates here.
- You don't know what period that premium applies
 to? Would it apply up to the completion of the project?
 - A Not from this record.
- On direct testimony you gave some testimony with respect to a sub-contractor by the name of Watsky, I believe, is that correct?
 - A Yes.
- You also gave testimony concerning a payment of retainnage to Mr. Watsky, correct?
 - A Yes.
- Did the School Board retain all of the subcontractors who had previously worked for Pabrizio & Martin in connection with the completion of the school subsequent to March of 1966?
 - A No.
- O Approximately how many do you recall were not retained or did not continue to work after March 1966?

	418a
1	pgg 6 Powler-gross 235
2	A I don't recall.
3	Q Do you know if the retainnage was paid to all
4	of those subcontractors who continued to work on the
5	school project subsequent to March of 1966?
6	A To the best of my knowledge they were.
7	Q Was any retainings paid to any of those sub-
8	contractors who did not return to work after March of
9	1966?
10	A No.
11	
12	The section of that II a contractor 26-
13	fused to return to work the School Board refused to pay
14	him the retainnage that he had earned prior to March of
15	1966?
16	A Was that my testimony?
17	Q Is that in effect what your testimony is?
18	A No.
	Q Isht that a fact that the School Board refused
19	to pay the retainnage to anybody, any subcontractor, who
20	didnot return to the job subsequent to March?
21	A Yes, that is fact.
22	Q Even though the moneys may have actually been
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And the work represented by those moneys had

earned by that subcontractor?

Barned --

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actually been performed?

Fowler-cross

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That is what I meant to say?

MR. YAVNER: I object to the question. It presumes that the witness knows what a particular subcontractor had earned who did not come back to work on the school and therefore it assumes he had knowledge--

THE COURT: You put him on the witness stand.

He signed requisitions. He testified with respect to these things. All Mr. Powers is asking him about is whether requisitions had been submitted by the plaintiff for work which has been completed and whether or not the School Board, even though that work had been completed, was retainnage, that 10 per cent in regard to holding it back.

MR. YAVNER: If your Honor is right I have misunderstood his question. But I think his question was referring to subcontractors of Fabrizio. Not to subcontractors with whom we entered into three-party contracts, but to people who never came back to work and he is asking whether retainers held by Fabrizio for these people were paid over by the School Board to these people.

That is my understanding of his question.

MR. POWERS: With one exception. He is com-

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Fowler-cross

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Fabrizio. Fabrizio was not holding it but the School Board was holding it. Basically, in effect, I think what the contention is, if a subcontractor of Pabrizio signed up with the School Board this was basically a bonus that they were giving the contractor that signed up.

They would pay him all of his back retainnage but if a former contractor or subcontractor of Pabrizio did not sign up to complete the school, the school ignored him and would not give him a dime.

That is in effect what I was referring to and I think that is in effect --

THE COURT: I have difficulty with this. I will let you continue.

MR. POWERS: The only relevancy is the actions of the School Board and how they reacted with respect to the people that were performing work on the school.

When was the last payment made to Fabrizio & Martin?

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A The last check was issued on February 21, 1966.

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O For work performed during what period?

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- I need to see the exhibit.
- I show you Defendant's Exhibit 78. Is that the correct one?

Yes, I have to correct the date -- no, the date of the check was correct, the certificate is February 16.

Yes, this is the last payment, No. 21.

- For what period?
- It covered the month of January 1966.
- In your direct examination you made reference to the fact that the School Board made payments to Watsky and others for work performed in February of 1966, is that correct?
 - That is correct.
- And isn't it a fact that they made those payments direct to Watsky and some other subcontractors because they did not pay Fabrizio & Martin for the February requisition that it submitted?
 - I am not sure it is because of that. MR. YAVNER: I object.
 - All right, let me rephrase it.

In lieu of making the February requistion due Fabrizio, payment under the February requisition to Fabrizio, the School Board in some cases paid subcontractors

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direct for work that they performed in February?

MR. YAVNER: I will object to the form of the question. It calls for a conclusion about which there has been no testimony at all that this was in lieu of something.

That is not what Dr. Fowler testified to before.

MR. POWERS: I believe this is cross-examination.

We already had testimony as to Watsky being paid direct for work done.

THE COURT: Objection overruled.

THE WITNESS: Would you repeat the question?

Q Is it not true that the School Board paid certain subcontractors for work performed in February 1966, even though during that period of time those subcontractors were working for Fabrizio & Martin?

A Yes.

Q To your knowledge, who was responsible for coordinating the work on this project, if you know?

- A Coordinating which work?
- Q Construction work.

A It is my understanding that it is the responsibility of the general contractor.

- O And where did you get this understanding from?
- A From discussions with the architect.

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2	gtg 5	Fowler-cross 242
3	A	Yes.
4	Q	And these payments were made directly by the School
5	Board,	correct?
6	A	Correct.
	Q	Prior to March of 1966, who was required to furnish
7 8	this Po	rt-O-San equipment?
9	A	The general contractor.
	Q	Didn't the general contractor subsequent to March
10	1966 hav	ve the same requirements af Fabrizio did prior to
11	1	966 in that regard?
12	Λ	I wouldn't know without looking at the specifica-
13	tions ar	nd the contract.
14	o	Do you have the specifications?
15	A	Yes. They are over there (indicating)
16	Q	Would you please look at them?
17	A	This won't tell me. I need the contract with Mars-
18	Normel.	and the contract with Mars-
19		Your question was, was that the requirement of
20	Mars-Nor	
21	0	Yes.
22	A	Yes.
23	0	
24	67.	It was a requirement of Mars-Normel?
25	۸	Yes.
	0	So it waspart of Mars-Normel's work, but here the

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gtg 6 Fowler-cross

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School Board is paying it directly.

A There was a period of time when there was no completion contractor and I would have to refer to the specific bills to find the period of time covered.

Q Would you do that, please?

There is a bill dated May 11, 1966. I believe Mars-Normel was on the job at that time.

There is another one, June 30, 1966.

- A Can you give me the check number on that?
- Mars-Normel was on the job at that time.

 Another one, September 15, 1966.

 When did Mars-Normel start work, dc you recall?

I'm sorry, are you still checking?

A Yes, I am still checking.
April 12, 1966.

The bill on June 30, 1966 covered a period from June 7, 1966 to July 7, 1966.

- Q Mars-Normel was on the job during that entire period, was it not?
 - A That is correct.
- O So it was basically the responsibility of Mars-Normal to furnish these, and yet the School Board is making the charge for it, correct?
 - A The School Board paid for them, yes.

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Q With respect to the various secretarial services that are identified on Defendant's Exhibit 94, do you know what the secretaries did during their normal work day on the days for which you're seeking overtime payment?

A Since you are speaking in general my recollection is that in most of those occasions they spent their entire work day working on this as well-- on the problem of having the contract re-bid.

O Did you check over the secretaries to determine what they were doing on those particular days that you are seeking to charge overtime for?

A In all cases they were responsible to me as executive assistant to the Superintendent. I checked the work which they did.

- Q You gave it direct or through someone?
- A Directly.
- O Let us start out with the first one. There is an Eleanor Kapp.
 - A It should be Knapp, K-n-a-p-p.
 - O And there is a bill for April 13, 1966.
 What was she doing on April 13, 1966, specifically?
 - A I don't recall.
- O There is a charge for the same date, a Marilyn McGinnis. What specifically was she doing on April 13th,

Now we have the next one, again for April 13,1966,

1	jgtg 8a	Fowler-cross	
2	a Mary F		245a
3		What was she doing on that date?	
4	A	Specificially?	
5	0	Specifically.	
6	A	I don't know.	
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There is a \$41 charge for overtime, secretarial 0 service visit.

Again, we have for the same date a Helen Riker.

- A I don't know.
- Isn't it basically true, doctor, that if I asked you the same questions with respect to the other items of secretarial overtime your answer would be the same?

The answer to the question of what specifically they were doing?

- Yes, what specifically were they doing during the course of the day?
 - That's correct.
- You have charged, again, for April 13, 1966, Hammond Electric, and that is maintaining heat in three buildings.

Who was responsible for maintaining heat prior to March 1966?

- Pabrizio and Martin. A
- You mean the general contractor? Q
- Yes.
- Was there any change made in that subsequent to March 1966?
 - No.
 - But yet this charge is being made by the School 3

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Board and it is not included in the Mars Normel price, correct?

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A This was for a period when Mars Normel was not on the job.

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Q What period was it for?

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A March 12, 1966 to April 14th, 1966.

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Q Do you have the specific invoice on that?

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A Yes. [Handing.)

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Prior to March 1966, who was responsible for--I believe you testified that the general contractor was responsible for maintaining guards and protecting the site, correct?

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A He was responsible for maintaining--for securing

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the site. If he employed quards, that was up to him.

However he did it, he was responsible for securing.

Was the same true subsequent to March 1966?

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A It was the general contractor, Mars Normel's responsibility, from the 12th of April on.

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You have invoice listed on Defendants' Exhibit 94 for April 13, 1966, May 11, 1966 and June 3rd, I believe, or

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21 June 6th, 1966.

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What periods did those invoices cover?

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A The last payment was for the week of April 25.

That would be included in the payment of \$736 listed as June 6.

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Q was that before Mars Normel came on the job?

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A I can't recall how soon after they executed the agreement the men actually arrived in any numbers on the site.

- When did they execute it, April 11 or 12, did you say?
 - A April 12.
- You also have an item of May 11, 1966, which is your legal fees by Mr. Yavner for \$17,500 in connection with default and letting of the completion contract.

Do you have any breakdown on that?

- ·A Breakdown?
- 2 Yes.
- A I have a claim form.
- Just atotal sum or does it list the hours or what have you?
- A It is a claim for that reas, "For legal services in connection with the default by Fabrizio and Martin on its contract for general construction of the middle school and letting, of a completion contract for said general construction and with related matters from March 1, 1966 to May 11, 1966."
- You don't know whether any of those related matters have to do with the school, do you? Do you know what the reference "and related matters" is in that statement?

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Yes.

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- And the actual bid price for the general construc-0 tion, utilities and site development which was the Pabrizio and Martin bid, I believe, is \$2,276,800 or is that the Rand bid?
 - I believe that is the Rand bid.
- What was the architect's estimate for performing the work? That was \$2,471,000.
 - You want to know what that figure is?
- Yes. Was that the architect's estimate for per-0 forming the work.
- A His estimate as of October 10, 1963. His estimate was that the general construction, utilities and site development would equal \$2,471,000.
- Had the architect issued an estimate subsequent to October 10, 1963, but prior to bid time?
 - I don't recall.
- So, in effect, the architect's estimate of the work is approximately \$200,000 higher than the Rand bid?

MR. YAVNER: Your Honor, I am going to object to this question and ask that this whole line of questions be stricken from the record.

I have waited to try to figure out what the relevance it has to the issues here and I think it is utterly irrelevant and immaterial.

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MR. POWERS: If I may, your Honor, as I stated in my opening statement, it is my contention and the contention of the plaintiff that anything that happened subsequent to the execution of the contract documents has no relevancy in that that's when the illegality occurred and the school Board was either damaged or not damaged at that juncture.

What I am showing here is, in one way, showing what the architect estimated the value of the work to be.

THE COURT: I thought that was the purpose of the question. I think that is a legitimate inquiry.

MR. YAVNER: But isn't that an inquiry that should be put to the architect rather than to Dr. Fowler?

THE COURT: I don't know.

MR. YAVNER: Because Dr. Fowler only knows what is on a piece of paper there.

THE COURT: This is cross examination. You may bring an expert on. At the same time, he has a right to ask your witness that.

If Dr. Fowler does not know, he can say "I don't know."

All right, go ahead.

MR. POWERS: Thank you, your Honor.

I ask that this be marked in evidence.

MR. YAVNER: Objection, your honor, for the reasons

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I gave before. I think that it is immaterial and irrelevant to this case.

THE COURT: I will overrule the objection. (Plaintiff's Exhibit number 5 was received in evidence.

- Were schedules prepared by the School Board fairly regularly throughout the construction of this job indicating the amount of money that had been expended, the amount of money that remained to be expended and elements such as those?
 - A Periodically, yes.
- I show you this document, dated at the bottom 4/13/66 but up on top it says March 31, 1966, and ask you if you can identify that document?
 - It looks like one that was prepared in our office.
- One of the columns provided for in that schedule is entitled "contingencies."

I believe it is the second column.

- It is not a column, it is a line. A
- Is it a line? I am sorry, I didn't see that. In fact, it is the next to the bottom line, contingencies.

What does that line represent?

It is part of the budgetary breakdown of the bond issue which was voted on by the people in the community.

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- In effect, doesn't that contingency mean the nonallocated portion of the bond issue? By non-allocated, I
 mean it is not allocated to general construction or electrical
 work or heating and ventillation or administration or anything else?
 - A It is a reserve item.
- And how much of a reserve did the Board have for the erection of this School based on the contracts which it had entered into?
 - A Based on the contracts?
 - Q Yes.
 - A \$8,196.
 - 2 What was the total projected cost of the school?
 - A At contract signing?
 - Q At contract signing.
 - A It was \$3,895,000.
- So it is almost #4 million, and the school had an \$8,000 contingency for a \$4 million project, is that correct?
 - A That's correct.

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2	and Martin and my reading of that schedule does not suggest
3	that they were untimely made.
4	Q May I see the schedule, please?
5	. A Here it is. (Handing)
6	Q The schedule you have given me gives the requisition
7	number, the date of the requisition, the date received by
8	the architect, the date of the architect's certificate and
9	the date of payment by Bedford Public School, apparently to
10	the contractor.
11	A Correct.
12	Q What date did you use for the date of payment in
13	sulling up that schedule?
14	A If I could have the exhibits of the Fabrizio and
15	Martin requisitions
16	Q Here. (Indicating)
17	A This would be the date of the check, the date on
18	which it was run through the accounting office.
19	The date of the check? The date that was on the
20	check?
21	A Yes.
22	Q Isn't it a fact that the School Board had the habit
23	of back dating its checks when making payments to the contractor
24	A Not to my knowledge.
25	2 Isn't it a fact that the School Board dated the

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checks the same as the date on the certificate issued by the

architect in the majority of cases?

A Well, you could compare that from the

A Well, you could compare that from the last two columns. The last solumn is the date of the check, the next to the last column being the date of the certificate.

Q It does not jive with my schedule. Was there a provision in the contract with respect to when payment was to be paid to Fabrizio?

A Yes.

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Q When was payment to be made? (Pause.)

A I would like to amend my answer to say that there were two articles at least in the general conditions of the contract with Fabrizio and Martin, which articles, 24 and Article 25, application for payments and certificates for payment—

- Q I am concerned with certificate for payment.
- A Do you want me to read what it says?
- Q No.

If you can summarize it, fine.

Basically didn't they receive payment ten days after the beginning of the month, by the 10th of the month?

A (Pause.) There is an article 24 in the supplementary general conditions saying no later than the 10th of each calendar month the owner will make partial payment to the con-

cated or entered on the card, correct?

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It's possible.

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If it has to be signed by a member of the Board, if the Board is not going to meet for a week or two weeks, the

check would wait until the next meeting of the Board?

No. The Board authorized by resolution the use of check signing equipment and the signatures that were required on these checks were the President and the Clerk and the Treasurer. The president and the clerks' signature were affixed by me as clerk, by this machine. The treasurer came in each day to sign checks.

So it required two separate signings, both could have been done within a day or two.

- YOu agree that the dates that you have listed on that sheet may not be the exact dates?
- They may not be the dates Fabrizio received the A check.

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Fowler-cross

Q I show you this document and ask you if you can identify it, please (handing).

A Yes. This was a press release prepared in my office.

O That was a press release that was prepared after the Rand Company advised the School Board that it had made a mistake in its bid and the Rand Company was let out from the bid that it had submitted or was permitted to withdraw its bid?

A Between those two. It was after they had asked to withdraw their bid but prior to the time when they were permitted to.

Q In that press release there is an indication that the School Board had hired a law firm specializing in construction law to aid them in determining what position the School Board should take in the situation that existed?

A That is what it says here.

This press release was issued prior to any negotiations with Fabrizio & Martin in connection with itsentering into a contract with the School Board?

A Yes.

MR. POWERS: I would like to offer this into evidence.

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Fowler-cross

MR. YAVNER: I object on the grounds it is irrelevant and immaterial to the issues of this case as you have defined them.

MR. POWERS: Just a moment.

I may have made a mistake.

(Pause.)

MR. POWERS: I'll ask a few more questions.

- O Dr. Fowler, did this press release refer specifically to whether the School Board should permit Rand to withdraw his bid or does it also refer to actions to be taken by the Board subsequent to the acceptance of the withdrawal of the Rand bid?
 - A Can I use my own words to explain about this?
 - Q Surely.
- A The situation was that we were yet to vote -- the public was yet to vote upon the proposal authorizing the bonds for the construction of the Middle School. The proposal was based upon, in part, bids that had already been submitted with Rand, the apparent low bidder. So, naturally, with Rand asking to withdraw its bid that created quite a bit of public concern as to whether the item on which they were voting had any significance so the press release was issued to reassure the public that the Board was taking every possible step legally to protect its interest

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Fowler-cross

and not simply allow Rand to withdraw its bid unless they were advised by counsel that that was the thing to do.

- O Then the employment of the law firm specializing in construction had to do with whether the School Board should permit Rand to withdraw or not?
 - A That's right.
 - Q And solely with respect to that?
 - A That is correct.

MR. POWERS: I withdraw that then, your Honor.

- I show you this letter of February 13, 1964, from the Architects Collaborative to Mr. Van Allsberg and ask you if you can identify that.
 - A I am familiar with this.
- Q By this letter Mr. Harkness of the Architects Collaborative is advising Mr. Van Allsberg that he and the estimator for Fabrizio & Martin got together in an attempt to determine what items of work could be eliminated from the contract, is that correct, and it also specifies the items to be eliminated, and also the dollar value placed on those items.

MR. YAVNER: I would like to object to this question. It happens that this is exactly what has been gone into in the previous judicial deliberations on this case.

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Fowler-cross

This is some of the evidence on the basis of which Judge McLean decided this was an illegal contract.

I don't know what is the point in going over again that this is an illegal contract. I don't see its materiality.

MR. POWERS: I am not introducing this for the purpose of showing legality or illegality.

I am introducing this testimony to show that the true value of the work that was eliminated from the contract documents was as indicated in these letters and as indicated in the change order to the contract which was entered into at the same time as the contract, and this, again, it is my contention that the only damages that the School Board could have is if there was some inequity to the School Board whereby say \$199,000 worth of work was eliminated from the contract and the contracter asked for \$200,000 reduction in the price of the centract, and that is where the School Board's possible damages would be.

I think this is on the question of damages and not on the question of legality.

THE COURT: Is the purpose of this to show the extent that was paid, that that would constitute a fair value?

MR. POWERS: Yes. As far as this is concerned,

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Fowler-cross

again, it is with the understanding-- my position is whether a completion contractor had to come in or not is not in this case. It is not an issue in this case. There you would have to determine who had breached the contract, determine whether the School is right in requesting completion cost or wrong in requesting that.

As the Court has already indicated there is no suit for breach of contract.

THE COURT: I am going to overrule the objection.

The question of the fair value as to what the School Board received has to be determined on the basis of what they actually received, what you gave them.

As I understand it you gave them not a completed school.

MR. POWERS: Did we give them an incomplete school because of their acts or our acts? That is where you have to get into the breach of contract.

THE COURT: I understand your point.

MR. POWERS: I maintain that we should not be getting into that issue in this case.

MR. YAVNER: I was writing this down, that the question was, did you give an incompleted building because of your act or our act.

The other day, perhaps only yesterday, I got a

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Fowler-cross

different impression, but if your Honor rules that that is the issue, who was responsible for what happened, then I do have a new line of questioning including of Dr. Fowler and additional witnesses.

I understand that that was not the point. It is a point that he has just raised. I have understood that you were ruling that was the issue.

MR. POWERS: I think Mr. Yavner has to try his own case. It is not up to me to tell him how to try it or what my position is.

THE COURT: He agrees with you. It is a question as to whose fault it was. His theory is that that is not the issue in this case.

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MR.POWERS: I would like to offer this letter of February 13, 1964 from the Architects Collaborative to Mr. Van Allsberg into evidence, please.

MR. YAVNER: If your Honor please, I object to the introduction of this letter because what this does is demonstrate the basis for the \$171,000 change order which was ruled by Judge McLean as the basis for the invalidity of the contract.

THE COURT: I gather what Mr. Powers is trying to show is valid, the value that the Board received.

MR. YAVNER: I don't think that this shows the value of what the Board received. The value of what the Board received is the value of that building as of the date that Fabrizio walked off it.

THE COURT: No. You can't determine that.

What are we going to determine that for? How are we going to determine that? Are you having someone come in and price it?

The only way that we are going to be able to determine that are extend to start a determination is to leak at the cents that you spreed to plus the matters that you had eliminated plus the verious change orders and find out, I suppose, how much of the work was done by Pebriais and semshow or other to attempt to arrive at it, unless

gtg 2 Fowler-cross

you are going to prove it by having someone come in and appraise it.

Otherwise, we have to have something to start with. You can't give me value— you have not shown any value in terms of the building so far. You have added to the cost as castra cost plue the fact that you want all the mency back that you received.

I den't know if you can arrive at value other than to start with some of the things Mr. Powers is suggesting and I think it is legitimate.

In any event, I overrule the objection.

(Plaintiff's Exhibit No. 6 was received in evidence.)

MR. POWERS: I would also like to introduce in evidence the schedule that I referred to and Dr. Powler testified to previously which indicated that the School Board at the commencement of this project based on the contracts that it had signed had a contingency of \$8,196.

THE COURT: Mr. Yavner, those are your documents.

MR. YAVNER: Yes, I know.

I have no objection to it. This is something that I rather like. I just had not seen it before.

THE COURT: All right, it will be received.

(Plaintiff's Exhibit No. 7 was received in evidence.

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BY MR. POWERS:

O Had you seen Plaintiff's Exhibit 6 previously, Dr. Fowler, do you recall?

A Yes.

THE COURT: What is 6, the letter?

MR. POWERS: That is the letter indicating the value.

Q Could you please read aloud the last paragraph on the second page running over to page 3?

A "I pointed out to Mr. Stippa and Mr. Pabrizio in my telephone conversation with him that I felt it was important to arrive at a solution to avoid the possibility of any action in relation to his bid bond and he agreed with this point of view.

I think the figures which he has indicated for the items listed above represent the true values as listed on his bid work sheets."

Q There is a mention there by Mr. Harkness with respect to taking action in connection with the bid bond.

A Yes.

Q Do you know what that reference is?

A It is Mr. Harkness' reference. I don't know what it is.

O Do you know whether by that Mr. Harkness was saying

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either you sign the contract with the change provisions or else we will sue you on your bid bond, in effect?

Isn't that what he is saying?

- A I don't know what he is saying.
- Q Is that what it sounds like to you?

MR. YAVNER: Your Honor, I will object to this.

I don't think that a witness is required to give an interpretation of what was in someone else's mind when he wrote something.

MR. POWERS: Dr. Fowler was involved throughout this entire procedure, your Honor, as clerk of the School Board and he has had familiarity with all of the documents involved here and it may refresh his recollection if asked the direct question as to what might have been the interpretation, or what might have been the intention of that phrase there.

MR. YAVNER: If you had asked him whether he had ever discussed this with Mr. Harkness and asked Mr. Harkness the meaning and Mr. Harkness told him, that is one thing.

But you're asking him to interpret what is meant by what Mr. Harkness wrote.

THE COURT: Mr. Yavner, I think that you have the better of the argument on that basis. I will sustain that objection.

•	gtg 5 Fowler-cross
2	MR. POWERS: Thank you, your Honor.
3	O Did you ever discuss this particular subject with
4	Mr. Harkness or anyone else in connection with the School
5	Board?
6	A Yes.
7	Q As to whether action would be taken against Fabrizio
8	on its bid bond?
9	A As to whether it might be, yes.
10	O And whether this might be done if he did not
11	sign a change order agreeing to take the work at the reduced
12	price?
13	A No.
14	Q You don't recall that?
15	A No. I recall specifically that was never consid-
16	ered.
17	Q As far as you know it was not considered?
18	λ In our discussions.
19	Q But you were not familiar with the terms or what
20	was meant in the language of this letter and that could
21	have been the intention between Dr. Harkness
22	MR. YAVNER: Objection, your Honor.
23	MR. POWERS: Withdrawn, your Honor.
24	Q Then also as indicated, Mr. Harkness states that he
25	had reviewed the figures and he thinks they are fair in
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gtg 6 Fowler-cross

relation to what Fabrizio had provided for in his bid documents, correct?

MR. YAVNER: I think as to that, your Honor, the document speaks for itself, whatever it says.

MR. POWERS: I am just pointing it out for the Court.

I will withdraw the question.

MR. YAVNER: It says certain things and --

MR. POWERS: I will withdraw the question.

- Dr. Fowler, I show you a letter of March 10, 1964 from the Architects Collaborative to Raymond Carter, and ask you if you can identify that letter, please.
 - A Yes.
 - Had you previously seen that letter?
 - A Yes.

MR. POWERS: I ask that it be introduced in evidence, please.

MR. YAVNER: I object to it on the same grounds that I did before. I believe primarily this establishes that the procedure was an illegal procedure and, therefore, the contract is void and I don't believe that this does establish value. It is a movement of figures around and that is all.

MR. POWERS: It goes to the question of damages,

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I believe, your Honor, the same as the last letter.

THE COURT: Overruled, objection overruled. The document will be received.

(Plaintiff's Exhibit No. 8 received in evidence.)

- Q Doctor, referring to Plaintiff's Exhibit 8, could you tell us, please, who Mr. Raymond Carter is?
- A Mr. Raymond Carter is an attorney who at the time this letter was written, was School Board counsel.
- Q And is it not a fact that Mr. Carter approved the procedure of eliminating the \$171,000 worth of work from the original contract documents and authorizing this elimination by change order No. 1?
 - A He implemented it. He prepared the change order.
- Q He was also consulted with respect to it as to its legality?
- A I don't remember specifically consultation on the legality to my knowledge that I was involved in.
 - Q You mean personally?
 - A Personally, yes, sir.
- O Although you did hear some statements by others,
 I take it?

MR. YAVNER: I don't know whether that is a question or whether you are making a statement for the record.

I think it ought to be clarified.

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Fowler-cross

If it is a statement it is very objectionable. If that is a question, ask it.

MR. POWERS: There is no answer so I will let it stand as is.

THE COURT: Let us move on.

Q I show you the minutes of the Study Session of the Board, dated March 17, 1964, and ask you if you have seen those before.

A Yes.

And those minutes indicate that the change order, cange order 1, which authorized +he elimination of the \$171,000 worth of work from the contract, ws read to the members of the School Board at that Study Session, does it not?

A Yes.

MR. POWERS: I ask that this be marked in evidence.

MR. YAVNER: Same objection to it.

THE COURT: It will be received.

(Plaintiff's Exhibit No. 9 received in evidence.)

O Dr. Fowler, I show you a portion of some minutes of a special meeting of the Board held on March 25, 1964, and ask you if you have seen this previously and with particular reference to the area that is bracketed.

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And at this meeting, as indicated on those minutes, the School Board approved the Fabrizio & Martin contract as well as change order No.1 to that contract? They ratified the signing of the contract. MR. POWERS: I offer this in evidence, please. (Plaintiff's Exhibit No. 10 received in evidence.) Dr. Fcwler, I show you a letter from the Architects Collaborative from Dr. Lynch, dated October 27, 1964, and I don't recall seeing this letter before. Since you were the Clerk of the Board and I believe had control over the documents of the Board, do you know whether the records that you have include the original of I would have to check. That material is here in

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Would you, please, unless you can say that this is a letter that is.

I don't recall the letter.. It was addressed to Dr. Lynch.

(Pause.)

The official records here show three letters of October 27, 1964, none of which is the letter which you have shown me.

Q Referring to this letter that I have shown you of October 27, 1964, do you recall whether at or about that time the School Board requested the architect to determine in what areas or how it might be possible to make savings of construction funds?

- Yes, I do recall that discussion.
- This is October 1964, about six months after the contract was let, correct?

More than six months. A little more than six months, seven months.

And at this early stage in the construction the School Board was again trying to find ways of cutting costs?

THE COURT: Is that a question?

MR. POWERS: Yes, your Honor.

You say again. There had been several change orders that had increased the cost of the school and that was reflected

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in that request?

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Q By again I mean other than change order 1, which eliminated \$117,000 worth of work.

Let us put it this way, at least at this juncture, in or around October 1964, the School Board was looking for different areas in which they could cut costs.

A We made inquiries of the architect to make those recommendations, that's correct.

Q Did these inquiries extend over any period of time?

A I would say that in this period of time, in the latter part of 1964, after several change orders had been approved increasing the costs, was the major period of concern.

Q Let us look at the facts now, doctor.

Change order one dealt with a change order increasing the price, I think, by either 55 or \$56,000, correct?

- A That's correct.
- Q And that was because that was an increase in the allocation to be given for blasting rock?
 - A That's correct.
- Q And isn't it a fact that this was a cost that could not be avoided, that it had to be made because of errors made in the borings taken at the project prior to the letting

460a 1 gte 3 Powler - cross 2 out of the contract? 3 I wouldn't characterize them as errors, but it was a problem with reading the borings, yes. So it wasn't a voluntary action on the part of the Board, in issuing change order 1. If they wanted the school they had to issue change order 1 so that this rock could be eliminated, correct? That's correct. Q So they weren't adding anything to the contract or to the project in the way of an addition of a room or anything of that nature? A No. I said additional cost. So was it by reason of these additional costs that were incurred that the School Board was looking for ways to save money? A As you pointed out, the contingency at contract signing was \$8,000. With a \$56,000 change order alrady approved, we ovbiously needed to find ways in which to reduce our costs. 23

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And isn't it a fact that the School Board was in this position throughout the construction of the school, favoring additional costs and trying to find areas for making payment for these additions?

MR. YAVNER: Your Honor, I object to this whole

line of questioning.

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I think whether the School Board had an \$8,000 contingency, whether it is a poor school board, a rich school board, whether it did these things or not is immaterial even to the issues as Mr. Powers has brought them in a while ago and I don't understand the purpose of the questions.

MR. POWERS: Your Honor, number 1, I think this goes to the equities involved. We are definitely dealing with an equitable situation where equities should enter into play.

In addition to that, we have a contention here by Pabrisio that his main problem with the School Board was that he wasn't receiving payment and the testimony will be adduced, and this is why the problem is encountered in the School Board and it was because of non-payment of monies that were due him that he stopped work.

That is the contention of Fabrizio and I am trying to prove this.

MR. YAVNER: The question of payment is a question of fact which can be determined one way or the other, but has nothing to do with whether a School Board, this or any other, wishes to find new economist and makes changes in its contract.

It may have made changes and the changes may have resulted in extras or resulted in credits, but that has nothing gte 5

Fowler - cross

to do with how soon Fabrizio got money or got paid. It has nothing to do with why he walked off the job.

MR. POWERS: It certainly does. Your Honor, he has claims of \$200,000, approximately, that weren't paid for.

THE COURT: I think, at least as I think I understand what the purpose of this is, it is cortainly to attempt to show some background to indicate and to justify the walking off of the job, which is in fact, as has been pointed out, one of the equities involved in the situation.

The contention of the plaintiff here her to be that they didn't do this with malice, they did it because they were forced to it by virtue of some circumstance, and it seems to me whether or not they are going to show that is another thing, but they certainly can make every effort to try.

All right, go ahead.

I refer you, Dr. Powers, to a memorandum from Mr. Beardsley to the School Board, dated November 5th, 1965, and ask you if you have seen that document previously?

A Yes.

MR. POWERS: I would like to have this introduced in evidence.

(Plaintiff's Exhibit number 11 was received in evidence.)

Q Doctor, I refer you to the last paragraph, which

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deals with the question of using the borrow pit for fill. I believe you were here yesterday when Mr. Crane said that the School Board authorized Fabrizio and Martin to purchase fill off the site because the material in the borrow pit was frozen and not useable at that time of the year.

Do you remember his testimony to that effect?

- A No, honestly, I don't remember him saying that.
- Q Mr. Beardsley was the clerk of the works at the time in question.
 - A That's correct.
- And in that memorandum he indicates that the material in the borrow pit was unsatisfactory for fill.
 - A That's correct.
- Q It doesn't say anything about freezing weather or anything like that or the material being frozen, does he?

MR. YAVNER: May I see the letter, please?

MR. POWERS: Yes. (Handing)

MR. YAVNER: It does not say anything about its not being frozen, either. I think the most that can be said is it doesn't say anything about weather. I object to the question.

THE COURT: Of course the question is legitimate and Dr. Fowler can answer that questionand you can go into it on redirect if you want.

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Q Doctor, does the memo not say, "The fill now being excavated from the borrow pit is unsatisfactory."

A Yes.

MR. POWERS: I submit, Mr. Yavner, if it was excavated it couldn't be frozen.

Now, I refer you, Dr. Wowler, to the letter of April 28, 1966 from Mr. Crane to Mars Normel, and ask you if you have seen that letter previously?

A Yes.

MR. POWERS: I ask that this be marked as the next exhibit.

(Plaintiff's Exhibit number 12 was received in evidence.)

On. Fowler, there is reference in this letter to two birch doors and frames, including hardware, as being required in the Central building between rooms 109 and 110 and also at the former elevator shaft on the second floor level.

Do you know, doctor, whether those doors were required under the original contract documents?

A Of my own knowledge, only with respect to one of these two.

- Q Only one of the two was required?
- A The elevator shaft, I know about that.

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pge 1 Fowler - cross 282 There's any reference to the other door between rooms 109 and 110? Is that also item 1? A "That's included, two Birch doors, between 109 and 110 and one at the elevator shaft. Q I refer you to a letter from Mr. Crane to Mars Normel dated April 28, 1966. I ask you if you have seen that letter previously? A Yes. Is that the item identified as Item 2 on the change order? Λ Yes. Do you know who completed the masonry work under the completion contract? Do you know if that was Barbar and Son? I don't recall. A Did you have a subcontract with John Barba and Son? Q A three party agreement? A Q I don't know. The board has no contract for that firm. How do you A spell the last name. Q B-a-r-b-a. A No. Do you have a copy of a subcontract by which Mars

Do you have any records that would indicate what

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No.

the amount of those contracts or subcontracts were?

I do not.

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How do you know the reasonableness of those subcontracts, the reasonableness of the price contained in those subcontracts?

MR. YAVNER: Objection, your Honor. This is a prime contract let under a competitive bid. They're about to take the low bid of prime contractor—what the architect has with his subcontractor is not a contractual or legal obligation of any weight on the Board of Education. He can give them a dollar or a thousand dollars.

It is immaterial to us.

MR. POWERS: Maybe they figured they would collect it from Fabrizio and Martin and that's why they cannot care less. This was a time and material contract and whatever—if they have a contract with this contractor for one hundred thousand dollars and the work is only worth \$50,000 that is obviously material to us.

MR. YAVNER: It is a guaranteed maximum upset contract. It is not an unlimited contract.

MR. POWERS: It is as far as these subcontractors are concerned.

THE COURT: I understand that some of these contracts were paid, subcontractors were paid, directly by the Board.

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It seems to me that those, I would think that any question this time would be relevant.

From what I gather, the inquiry you are now making is not with respect to those contracts covered by the general contract itself, so my feeling would be that it is proper inquiry into the legitimacies into the general contract.

MR. POWERS: If I may, your Honor, I have notations on this letter that I have as to the amounts of these two subcontracts and the only way I could have gotten those amounts was from an examination of the schools records. Basically my intent is to show that the amounts of these two subcontracts are way out of proportion to the amount of work.

THE COURT: It is a legitimate inquiry if the School Board paid the contractor. Dr. Fowler does not seem to recognize—he has nothing with respect to that, is that correct?

A That's correct.

MR. POWERS: This is another reason why the breakdown of Mars Normel requisitions are inadequate because if they had a breakdown then we could be able to trace the price probable. This defeats my inquiry in this area as well as not having this back up material.

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MR. YAVNER: Your Honor, we have a contract with Mars-Normel for a guaranteed maximum upset with provision for recovering 50 per cent---

THE WITNESS: 25 per cent.

MR. YAVNER: 25 per cent of the savings if there was savings.

That contract ended with a savings over the guaranteed maximum upset.

So these questions as to what Mars paid subcontractors—subs are paid a price according to a contract. It is Mars' own labor that goes on time and material. I think you have that confused too.

MR. POWERS: These are subcontractors that were not on the job originally and subcontracts were entered into directly by Mars-Normel.

MR. YAVNER: Unless you show they are subcontracts—
I have never seen subcontracts but ordinarily a subcontract
is for a lump sum price. There may be variations in that.
But a time and material contract is something entirely different and unless we are told what kind of contracts Mars had with these two firms we are talking in the dark. I don't know.

MR. POWERS: You should know.

MR. YAVNER: Please come on. I have the Mars

MR. YAVNER: Probably at most two. I have got

to get certain back-up information here.

THE COURT: No witnesses.

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MR.POWERS: Might I inquire who the two witnesses might be so we might expedite this?

MR. YAVNER: During lunch I tried to make some calls to arrange for that. I thought we might get to that this afternoon. It will be probably be Harkness and Crane, and if those two are not available, there will be someone else from the architectural firm.

Then I need somebody from the School Board to pick up some of these other things.

THE COURT: How many witnesses do you think you will have?

MR. POWERS: Two.

THE COURT: Mr. Trager?

MR. TRAGER: Five, but for very short testimony, on direct, that is.

THE COURT: I understand.

I know what you are talking about.

I want you gentlemen now to get your documentation that you were going to submit and you and Mr. Trager who have not submitted any documents, submit them over the weekend to Mr. Yavner so that will help speed up the case.

I am going to hold a session here— I have to get rid of this— I am going to hold you in here until at least 6:30 or more. I may go beyond that. I have got to finish

this case within some length of time. I think if I hold your noses to the grindstone you may cooperate with me and expecite this.

So the Court will be adjourned until 10:00 o'clock Monday morning, but I gather that with this that both you, Mr. Powers, and you, Mr. Yavner, and you, Mr. Trager, ought to have your witnesses in the courtroom.

(Adjourned to 10:00 a.m., Monday, March 5, 1973.)

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Direct Cross Redirect Recross

Charles W. Fowler (Resumed)

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FABRIZIO & MARTIN, INCORPORATED

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BOARD OF EDUCATION, et al.

v.

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March 5, 1973 10:00 a.m.

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(Trial resumed.)

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CHARLES W. FOWLER, resumed.

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MR. YAVNER: If your Honor please, may I just make an application on this point.

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Dr. Fowler is the superintendent of schools in the City of DeCalb in Illinois. He has several very important meetings this afternoon and evening there. He must leave New York at 12 to get his plane there and then he can come back in the morning.

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I understand from Mr. Powers that his examination will probably go on all day long and so I should like to ask that Dr. Fowler be excused at 12 and we will put on another witness in the afternoon.

THE COURT: I will tell you quite frankly, Mr. Yavner, I had anticipated that we might be finished with this case today since we are going until 6:30 tonight. But in any event, let's see how we go.

THE COURT: Doctor, you will be back here tomorrow morning?

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THE WITNESS: I can get the first flight out of Chicago tomorrow morning and be here by 10:30.

THE COURT: I am not sure we will be able to do that.

I have time pressures, too, with this case, but let's see how
we proceed.

CONTINUED CROSS EXAMINATION

BY MR. POWERS:

Or. Fowler, near the end of our session last Friday,
I asked you about two subcontracts that had been entered into
by Mars Normel for the completion of the school, one with
Sorly Construction Company and another by John Barba Sons,
Inc., and at that time you had no recollection of receiving
copies of those subcontracts, is that correct?

- A That's correct.
- And at the close of the session on Friday you reviewed your records and did locate those contracts, is that correct?
 - A That's correct.
- Q I show you this letter of May 18 from Mars Normel to yourself and ask you if you can identify that document?
- A This is an agreement between Mars Associates and Normel Construction Corporation and John Barba Sons, Incorporated?
 - A That agreement is enclosed with the letter.
 - A That's correct.

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	To which I made reference, correct?
3	A That's correct.
4	Q And was that for masonry work?
5	A That's what the letter from Mr. Singer indicated,
6	yes.
7	Q Does the agreement also indicate that it is for ma-
8	sonry work?
9	A It appears on the face of the agreement it is for
10	masonry work and supplying face brick and material, other
11	materials.
12	MR. POWERS: I ask that the letter and annexed
13	agreement be marked as one exhibit.
14	MR. YAVNER: No objection.
15	
16	(Plaintiff's Exhibit 13 was received in evidence.) Or. Fowler, I show was received in evidence.)
17	Dr. Fowler, I show you a letter dated May 19,
18	1966 from Mars Normel to the School Board, your attention,
19	which encloses an agreement between Mars Normel and Sorly
20	Construction Company, and ask you if you can identify that, please?
21	
22	A It is a letter received in my office enclosing signed
23	copy of a contract between Mars Normel and Sorly.
	Q And does that subcontractor deal with Sorly agreeing
24	to perform carpentry work?
25	A That's correct.

Fowler - cross

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MR. POWRS: I ask that this letter with the annexed agreement be marked as the next exhibit, please.

(Plaintiff's Exhibit 14 was received in evidence.)

Referring to Exhibit 13, Dr. Fowler, which is the John Barba Sons, Inc. agreement for masonry and face brick, could you tell us, please, the amount of that subcontract?

A \$95,000.

And that is to complete the masonry work that was not performed by Fabrizio and Martin while it was on the project, correct?

A I assume it is to do the masonry work and supply the brick under our agreement with Mars Normel.

And was there any difference between your agreement with Mars Normel and your agreement with Fabrizio and Martin with respect to the amount of masonry and face brick?

A Not that I recall.

Q I show you Plaintiff's Exhibit 3, which is requisition number 22 of Fabrizio and Martin.

This is the requisition for work performed in Pebruary of 1966. I believe that was the last requisition that Pabrizio and Martin submitted to the School Board, correct?

A I don't believe it was submitted to the -- I believe it was submitted to the architect, not to the school.

To the architect, who was the representative of the

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Fowler-cross

Q And although Fabrizio & Martin had only \$14,940 of masonry work to complete according to that requisition, the architect approved a subcontract of Mars-Normal for \$95,000 for that work, that same work?

A Well, I can testify to the two things. The architect apparently received and approved that subcontract; and, yes, that is the amount that is remaining in that column.

O So there is a difference of about \$80,000 between the two documents, correct, the amounts?

A Yes.

So then if I understand it correctly, although
Fabrizio & Martin only had about \$15,000 worth of masonry
work to complete, according to the architect's approval
of the requisition, the architect approved a contract or
a subcontract with Sorly for \$95,000 or a difference of
\$80,000 over the amount of work shown yet to be done by
Fabrizio & Martin?

A It is my understanding that the architect's approval is not as to the amount of the subcontract, but as to the subcontractor as a person who can be used on the job.

- Q Well, he approved the requisition, did he not?
- A Which requisition?

Powler-cross

Q Requisition 22, Plaintiff's Exhibit 3.

Yes. I am not speaking to that, I am speaking A to the question of the Mars-Normel subcontractor. His approval there is not of the subcontract dollar amount, his approval is of the use of that firm as a subcontractor.

Well, isn't it a fact that Mars-Normel had a time and material contract with the School Board?

- We had an upset price. A
- With an upset price, but time and material?
- Guaranteed maximum of \$403,000. A

Correct. But wouldn't the amount of any subcontract for masonry work have a bearing on the amount that Mars-Normal is going to submit as its bid?

But the architect's approval on that would come A at the time Mars-Normel billed for the masonry work. They would approve the dollar amount that Mars had billed for the masonry work, it would not relate to the subcontract amount.

THE COURT: I suppose aside from that fact is the fact that I want to know, did you pay \$95,000 for the work that Fabrizio had contracted to do? That is what I am interested in.

THE WITNESS: The amount which we paid under this could only be revealed by examining the Mars-Normel payment

> SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

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Powler-cross

THE COURT: There was a requisition there that was shown to you for \$95,000.

THE WITNESS: That is not a requisition, your Honor. That is a subcontract between Mars-Normel and a supplier, a subcontractor.

Our agreement was with Mars-Normel. What Mars-Normel did with the subcontractor mattered to us only in terms of the quality of the subcontractor.

THE COURT: All right. But the point that it seems to me at least I am interested in-- I don't know whether Mr. Powers is or not -- but I am interested in finding out how much, without all of this, whether you, in fact, paid \$95,000 for the work that was scheduled to cost you \$15,000?

THE WITNESS: That would come out in the Mars-Normal requisitions.

THE COURT: Would you be kind enough to find the answer to that question?

THE WITNESS: I am not qualified to take those Mars -- I think an architect will --

MR. YAVNER: Your Honor, if Mr. Powers permits, I am going to have a representative of Mars who will be here this afternoon, who will be able to testify to that,

What those requisitions mean?

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that.

MR. YAVNER: Objection. He did not testify to

MR. POWERS: This is cross-examination, your Honor.

THE COURT: It is cross-examination. He can answer.

A I have limited knowledge as to the mechanics of the construction work which was being billed. I relied and the Board relied upon the architect's certification as to the construction work that had been accomplished.

Q What did you know about those requisitions that were submitted by Mars-Normel other than the fact that you received them?

A I knew as to their amount and as to the architect's certification of the amount.

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Fowler-cross

- You mean the amount that was on the face of the requisition?
- A Correct.
 - I could do that by just looking at it and say that is the amount of the requisition, correct?
 - A I assume you could.
 - And the architect's approval or certification, that is someone else that told you that he was certifying those figures to be correct. You didn't know whether they were correct?
 - That is someone we employed to tell us that they were correct.
 - But you didn't know whether they were correct or incorrect?
 - A That is right.
 - Did you--Q
 - THE COURT: You relied in all these matters on your architect who is your expert and followed his advice? THE WITNESS: Yes.
 - Did you or the School Board, to your knowledge, to your knowledge, receive any notification from Sorly that it had not been receiving payments from Mars-Normel?
 - I only recall only one instance of a subcontractor raising a concern about receiving payments from Mars- Normal.

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Fowler - cross

At the moment I don't recall which subcontractor it was.

- O Do you have any reason to believe that Sorly did not receive the full \$95,000 as provided for in its contract from Mars-Normel?
 - A I have no way of knowing.
 - You have no way of knowing?
 - A No.

MR. YAVNER: Your Honor, I am confused. The name of Sorly is given here and I understood that the \$95,000 contract was with someone named Barba

MR. POWERS: It is Barber, excsue me.

Q Let me direct the question to Barber.

Do you have any reason to believe that Mars-Normel did not pay to Barber the \$95,000 provided for in its sub-contract?

- A As far as I have no knowledge of what Mars-Normel paid to any subcontractor --
- But do you have any records to indicate that

 Barber objected to the School Board about not receiving payments from Mars-Normel in accordance with its subcontract
 marked as Plaintiff's Exhibit 13?
 - A Not that I recall.
 - O I refer you to Plaintiff's Exhibit 14 which is the

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Fowler - cross

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subcontract between Mars-Normel and Sorly Construction.

Could you tell us, please, the amount of that subcontract?

A \$47,000.

- Q I believe that is for carpentry work, is it not?
- A Yes.

Qg 3

- Q I again refer you to requisition 22 which is Exhibit 3, Plaintiff's Exhibit 3.
 - A Yes.
- Q More particularly to item 11 which is entitled Rough Carpentry.

Again referring to the last column, balance to complete, we are referring to what the architect determined the balance of rough carpentry work was to be completed by Pabrizio & Martin as of the time it left the job, correct? That is in item 11.

- A Yes.
- Looking at item 11 there are sub-sections A through H of item 11. Would you tell me, please, what they tally up to and what the last column tallies up to, namely the balance to complete?
 - A \$28,950.
 - Q The subcontract is \$47,500?
 - A That is correct.

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gQg 4 Fowler-cross

Do you have any reason to believe that Mars-Normel Q did not pay the full \$47,500 to Sorly?

I have no knowledge of that.

But you do not recall any complaints being made 0 by Sorly about not having received any payments under its subcontract?

That is correct.

Do you have up there the supplemental answers to interrogatories?

No, I do not. A

THE COURT: I have one here.

MR. POWERS: I think this one is clean and then I will use Mr. Trager's, if it is all right with the Court. THE COURT: All right.

With respect to the supplemental amended answers Q to interrogatories which were submitted on Thursday, this past Thursday, at the opening of the trial, you provide in the first line for Pabrizio & Martin contract plus approved change orders and you have a figure of \$2,620,901.14; is that correct?

A That is correct.

Annexed as an exhibit or, I would assume, are the original answers to interrogatories and in schedule 1, page 1, again them is a provision -- do you have that?

Qg 5

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Yes.

Fowler-cross

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On the first line, contract amount with Pabrizio & Martin as amended by change orders, \$2,641,697, a difference between that figure and your supplemental figure of approximately \$21,000, correct?

A Yes.

Q Could you tell me how you arrived at this different figure?

A I took the basic contract, \$2,489,400, added to that amount change orders --

- Q You mean Pabrizio's original basic contract?
- A Yes. Correct.
- Q All right.

A I added to that change order additions of \$13,501.14 totaling \$2,620,901.14.

Q Would you tell me, please, how you arrived at the \$2,641,697 in your original answer?

A I do not know.

I ask you to look at requisition 22, Plaintiff's Exhibit 3, on the last page, and I believe there is an item there tallying up contract amount, is there not? That is the first column, contract amount?

A Yes.

O What is the figure given as the contract amount in

requisi-

	1,000
1	Qg 6 Fowler-cross
3	requistion 22 which you previously testified to was an
4	proved by the architect?
5	A \$2,641,697.48.
6	Q So that amount corresponds with the amount con-
7	tained in your original answers to interrogatories, does
8	A Yes, it does
9	100, 10 0000.
10	You say you can't account for the difference now between that figure and the present figure?
11	A I can account for the difference between requisi-
12	tion 22's amount and the amended answer.
13	Q That would be the same as making the other com-
14	parison?
15 16	A Requisition 22 has within the column the total
17	\$2,641,000 two change orders which had not been approved
.8	by the Board of Education.
9	Q Had they been approved by the architect?
0	A I believe Mr. Crane testified to that, yes.
1	because they were not approved by the
2	Board you have excluded \$21,000 from the contract amount, is that correct? Even though that amount had been ap-
3	proved by the architect?

They were not change orders to the contract until they were executed by the Board.

1	jqe 1 Fowler - cross 307
2	Q Did the Board disapprove those two change orders?
3	A The Board never acted on them.
4	Q And if they did act they would have done what the
5	architect had suggested they did, namely approve them, correct
6	A I can't predict that.
7	Q Didn't they do that in all other instances in the
8	past with respect to change orders?
9	A I don't believe so.
10	Q Again referring to the supplemental answers going
11	down, payments to Mars Normal on the Fabrizio and Martin
12	contract, \$428,164, correct?
13	A Yes.
14	
15	Q That includes, I take it, both what you testified to previously as the original contract
16	to previously as the original contract work under the contract for \$403,000 plus extra work that
17	for \$403,000 plus extra work that was performed by Mars Normel
18	over and above that amount, is that correct? That is how you arrive at this figure of 428?
19	
20	donctact of Mars Normel, the guaranteed
21	maximum price was adjusted by change order number 1 to Mars Normel.
22	
23	ondings order number I is annexed as an
24	exhibit to the supp, emental answers, is it not?
25	A The change order is not but an analysis of the change
	order is.

1	jqe 4 Fowler - cross 310
2	A That's correct, they did that at their risk.
3	
4	too, did it mt?
5	A Did they perform work without a change order?
6	Q Yes.
7	A On a number of occasions, I believe.
8	Q And they didn't fair out as well, did they?
9	MR. YAVNER: Your Honor, if it is a question to the
10	witness it should be answered but if it is comment by counsel
11	I think it is improper at this time and it ought to be stricked
12	from the record.
13	He has his opportunity to make his argument later
14	on.
15	THE COURT: Mr. Powers, Mr. Yavner has raised a
16	question about your last comment. Was it a question?
17	MR. POWERS: That was in the form of a question.
18	THE COURT: You seemed not very interested in hearing
19	an answer to it in any event.
20	MR. POWERS: I think I know what the answer would be
21	and that is why I wasn't interested.
22	MR. YAVNER: Mr. Powers will have ample opportunity
23	to make his comments later on.
24	THE COURT: If it was a question Dr. Fowler has
25	to answer it.
- 11	

Fowler - cross

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MR. POWERS: In the future I will refrain from asking such questions anyway.

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THE COURT: All right.

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Doctor, isn't it a fact that Mars Normel completed its contract work as of November 9, 1966 and I refer you to what I am told is an affidavit of yours, an exhibit to an affidavit of yours submitted in another action, the action between Aetna and the School Board.

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A Yes.

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MR. YAVNER: May we have the reference?

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MR. POWERS: This is Exhibit 14, an affidavit of Charles W. Fowler sworn to the 13th of Pebruary 1970.

13 14

THE COURT: Dr. Fowler, I have been giving that

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request of your counsel some thought and I am not going to be able to cooperate. I think if you had advised me of this prob-

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lem on Friday I would have had a session on Saturday but I

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told all counsel here the fact that we were going to move on

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with this case and I won't be able to cooperate with you at all.

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MR. YAVNER: I did not appreciate until Mr. Powers informed me last night, when I spoke to him on the phone, that

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he was expecting to take all day.

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THE COURT: You could have solved the problem by telling me last week. I am going to insist that Dr. Fowler stay until his examination is completed.

MR. POWERS: With due respect to what you are saying,

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case over with.

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24 25 it was my understanding that Mr. Yavner said he had witnesses that would keep us here the rest of the day.

THE COURT: The point is that I asked everybody to have their witnesses here because I told you that we would be here until 6:30 today and I told you that I had to get this

If there had been any problem with that I would have cooperated with you.

MR. YAVNER: The problem arose only when I learned that Mr. Powers was expecting--

THE COURT: You should have discussed that before.

You knew he was an important witness. You can't expect counsel to keep him here a few hours when you had him on direct examination for a couple of days.

THE WITNESS: Your Honor, if I may ask, this is probably the most important decision in our School District. We have a \$6,000,000 construction matter that is resting in part on my being present for two very important meetings.

I come here as a voluntary witness. I am not connected with the School System. I expected to be a witness on the first day or the second.

THE COURT: I appreciate that and I am sorry but I advised counsel on both occasions that I had planned to finish this case and I am afraid I can't comply with your request.

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498a take 3a 1 gte 1 Powler - cross I refer you to item 5, which is purchase and install 3 toilet room accessory. 4 What toilet room accessories are referred to there? 5 A I don't know. 6 Do you know where they were installed? 7 A No. I refer you to item 8, overrun and punch list, 9 14,120.50. 10 Was there an original provision in the Mars Normel 11 contract with respect to punch list of Pabrisio and Martin? 12 I believe there was an allowance for punch list 13 work. 14 How much was that allowance? Q 15 I don't recall without seeing the specifications. A 16 Would that be in the Mars Normel contract? 0 17 Yes, I think it would be. A 18 Do you have a copy of it? Q 19 Article 6, allowance for corrective work, a guaranteed 20 maximum is deemed to include an allowance of \$15,000 for 21 correction of the punch list work. 22 And that \$15,000 is included in the contract price 23 of 403,000, correct? 24 A

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That's correct. And as I understand this item on the summary of the SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

. .,

vided for was an amendment to the agreement?

Do you know if that additional \$5,000 allowed pro-

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gte	3	Powler	_	~~~
		LOWTEL	-	CLOS

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- How are you using the word amendment? . A
- Amendment or a change from the original agreement. 0 Let me rephrase that.

What provision was made for corrective work in the completion plans and specifications that were issued to Mars Normel plus all of the other bidders for the completion work?

Well, we stated that they would have to correct work improperly done by Fabrisio and Martin and that an allowance would be established for it.

I believe that the contract documents on which the bid was made included a statement like this.

- What about the mid documents for the completion work what is contained in there?
 - That's what I was referring to. I don't have those. A MR. POWERS: Weren't they marked? MR. YAVNER: You objected to them. (Pause.)
 - It does not appear to be here.
 - Pardon, Doctor.
- That particular document, the bidding documents, doesn't appear to be here. I have only a list, which is part of the bidding decuments, indicate the corrected work that needed to be done.
 - So you don't know whther the provision for allowing Q

\$15,000 is a provision that was provided for all of the bidders for the completion work, is that what you are saying?

A I guess what I am saying is the allowance was provided all the bidders. Whether at the time of bidding the allowance was \$10,000 or \$15,000 I do not know.

So if it were \$10,000 in the bid documents, then the contract that you entered into with Mars Normel was different than the contract that you let out for bids for the completion work, would that be correct?

A If those were the circumstances, yes.

So you would be faced with the same situation as Fabrizio and Martin where you let the contract out on documents different than the bid documents?

MR. YAVNER: I object to that, your Honor, because that is calling for a conclusion of law and the facts are entirely different and the law would be applied differently. This witness is not competent to testify to what the law is.

THE COURT: He is not asking him about the law, he is asking him whether or not he let documents out on--

MR. YAVNER: No. His question as I understood it was this--

MR. POWERS: Strictly a factual question, your Honor,

MR. YAVNER: Because there was a change--

THE COURT: You don't need to argue. Let the reporter

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2	Fowler - cross 318
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4	I understand it to be purely a factual question that Dr. Fowler can answer.
5	Read it back.
6	(Record read.)
7	
8	MR. YAVNER: Exactly, and it is an entirely dif-
9	ferent situation as a matter of law, your Honor.
10	If you wish I will describe it and argue it right
11	now.
12	THE COURT: The point is you made an objection and
13	I am overruling the objection. I don't need you to describe
	anything.
14	You made an objection to the question and I am over-
15	ruling the objection. I think it is a factual question.
16	Dr. Powler can answer it yes or no. If he can't
17	answer it he can say so.
18	A Under the situation which you are hypothecizing, yes,
19	it would be the same.
20	Q Turning to item 10 of the summary of the change order
21	one issued to Mars Normel, which is on page 2 of that summary,
2	you have sound gaskets on doors.
23	Do you know what doors are referred to in this item?,
4	A No.
5	Q In what building?

1	gte 6	Fowler - cross 319
2	A	No.
3	Q.,	Or what work was done in connection with those sound
4	gaskets?	
5	A	No.
6	Q	Then referring to item 11 in that same change order
7	for \$7,86	5, it says furnish and install vibramat.
8		THE COURT: What is that?
9		ME 2000RS: Don't ask-me what it is, your Honor,
10	I don't k	
11		THE COURT: I am still in the dark.
12	Q	Do you know whether the original contract documents
13	under whi	ch Fabrizio and Martin was to performed its work pro-
14		the furnishing and installation of a Vibramat?
15	A	No, I don't.
16	. 0	Do you know what a vibramat is?
17	A	No.
18	Q	Do you know what its function was?
19	A	No.
20	Q	Where it was installed?
21	A	No.
2	Q	Now I refer you to item 16 in the same change order,
3	and that r	refers to adapt structural framing at gym for folding
4	partitions	
5		Do you know what that refers to, doctor?

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I believe so.

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If this was work of County Iron, County Iron would have been required to perform that work under its completion contract with--

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MR. YAVNER: Objection to the question. There are

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so many assumptions in that question where the witness has already said that he does not know, I think it is an improper question.

THE COURT: Objection sustained.

Q Item 17 on that change order is for \$12,650, acoustical work on a subcontract to nail acoustic.

Am I reading that correctly?

- A It appears to be.
- Q Do you know what that refers to?

A My recollection of this is that there was a certain amount of acoustical work to be done, that there was a subcontract, somebody who does latching or something like that, and when Mars Normel came to have that work done the subcontractor indicated that his agreement with Fabrizio and Martin was only to supply the materials and not necessarily to do the installation.

Q Do you know where it is provided in the original specs that acoustic is to be nailed?

- A No, I don't know.
- Referring to item 19 of that same summary, it says install louvres and miscellaneous items, fresh air louvres, install fins, new bolts.

Do you know what this item refers to?

A No.

1	gte 9	Fowler - cross 322
2	2 0	The next item, provide additional reinforcing steel.
3	1	Do you know where that steel was required?
4		MR. YAVNER: Is that number 20?
5		MR. POWERS: That is number 20.
6	A	No, I don't.
7	Q	Do you know where that steel was required?
8	A	No.
9	Q	Do you know what kind of steel, reinforcing steel?
10	A	No.
11	0	Do you know for what purpose?
1 2	A	No.
13	Q	Item 25, additional planning for gym roof, roughly
14	\$2200.	22 - Coughly
15		Do you know how much planning was required to be
16	installed?	e de la compe
17	A	No.
18	2	Wasn't Mars Normel required to complete the school
19	under its	guaranteed maximum?
20	A :	Yes.
21	Q (Could you tell me how this is an extra to the Mars
22	Normal conf	tract?
23	A 1	cannot. The architect could, Mars Normel could.
24	Q	refer you to item 27, extra to Johin Associates,
25	punch list	items in B and C buildings.

1 2	gte 10	Fowler - cross 323
	1	Could you tell me why these extras were not included
3	with the	other punch list items that encompass roughly \$14,000
. 4	or so us	nder item 8 of this same summary?
5	'A	No, I don't know.
6	Q	Did Jobin Associates enter into a triparti agreement?
7	A	Yes.
8	Q	And do you know why it is entitled to an extra in
9	view of	this subcontract?
10	A	I assume it was not work that they had originally
11	done.	
12	Q	But you are not certain of that?
13	A	But I am not certain.
14	Q	I refer you to item 29 in the same summary, providing
	fire exti	inguisher cabinets.
16 17		Do you know where they are provided for in the speci-
	fications	17
18	A	No.
19	Q	Do you know whether that is the work of the plumbing
20	contracto	사람들은 사람들은 사람들은 사람들은 사람들은 사람들은 사람들은 사람들은
21	A	No, I don't.
22	9	Item 30, direct balance of structural steel.
23		Do you know what steel was not erected?
24	A	No.
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1	gtg 2 Fowler-cross
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3	is in Mars-Normel's mind.
4	When he says shouldn't have Mars have known
5	MR. POWERS: All right, I will withdraw the ques-
6	tion.
7	
8	THE COURT: All right, you withdraw the question.
9	MR. POWERS: To save time.
10	where
11	was the chalkboard to be completed?
12	A I don't know.
13	Q Can you tell me why this item was not charged to
14	the subcontractor who was to furnish and install the chalk-
15	board?
16	A Then I would need to refresh my recollection on
	this, but I believe that subcontractor I don't believe
17	he performed his work.
18	Q And you are charging Fabrizio & Martin for him
19	not performing his work?
20	A The two items, 34 and 35, were taken together. I
21	don't remember the details of them.
22	0 36
23	Miscellaneous brick paving and fibor paving. Where was this work required?
24	A I don't know.
25	O Do you know if it was in part of the guaranteed
	and in part of the guaranteed

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to this.

Fowler-cross

The architest has certified to the Board two things:

They were the responsibility of Fabrizio under his contract and the specifications and they have certified that they were not a responsibility of Mars under its original contract.

Now, they would have to testify as to how they reached that conclusion.

THE COURT: I see.

MR. POWERS: This is what we are refuting, your Honor, saying some of these items should not be in here, many of them.

THE COURT: But you are saying that all of these items that Mr. Powers has made inquiries about to you, about the acoustical screening and so forth, were items that the contractor indicated were in the contract with Pabrizio and they did not complete it, is that correct?

THE WITNESS: Yes. He was required to do that work.

THE COURT: All right.

MR. POWERS: You see, it is our position that it should be within the guaranteed maximum and not an extra, your Honor.

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Fowler - cross

It is unfortunate, but I have to

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THE COURT: I understand that.

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go through this with Mr. Powler point by point even though he may not know that much about the various items, just to show that he does not know anything and attempt to dis-

MR. POWERS:

prove that just putting this document into evidence and making it valid evidence.

THE COURT: I am going to ask some questions to be sure I understand what is going on.

Dr. Fowler, how many contracts did the School Board enter into with MacNamee?

I believe two.

Referring to the supplemental answers to interrogatories, there are three separate items broken out indicating that there were three contracts with MacNamee.

I refer you to page 2 of schedule 1, Exhibit A. There is a general site development contract for - - this is the claim that is being made, anyway -- general site development work for \$19,000 plus, miscellaneous site work for \$20,000 plus and parking and curbing for \$62,000 plus.

Why do we have a break-out of three different items if there were only two contracts?

It is my recollection that he billed -- on one of the contracts he separated his billings into two separate

gtg 6 Powler-cross

- O Isn't it a fact, Doctor, that one of these items is completely extra work that is outside and above the contract that had been entered into with Fabrizio & Martin, either the miscellaneous site work or the general site development?
 - A I need to refer to the contract documents for that.
 - Q Please do.

THE WITNESS: Mr. Yavner, can I have that whole pile on the corner of the table there.

(Handed to witness.)

- A I think I am prepared to answer your question.
 Would you repeat the question?
- O Isn't it a fact that either the general site development or the miscellaneous site work as contained on this schedule is comprised of extra work outside the Fabrizio & Martin contract?
- A Extra work outside MacNamee's subcontract with Fabrizio & Martin, but not extra work outside the Fabrizio & Martin contract.
- O Let me see if I can't refresh your recollection, Doctor.

I refer you to a memo of June 3, 1966 from yourself to Duane Ahlf, and ask you if you can identify that, and I

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Fowler-cross

am referring specifically to the first full paragraph on the bottom of the page.

- A I have read this. I don't see the relationship to your question.
 - Q That is a memo that you wrote to Dr. Ahlf?
 - A That is correct.

MR. POWERS: I would like to have this marked in evidence.

(Plaintiff's Exhibit No. 15 received in evidence.)

Q Doctor, referring to Plaintiff's Exhibit 15, in your memo you refer to a cost of \$8700 for general restoration work to the borrow pit, another \$1500 for seeding for suitable play field.

Are those items that were part of the original contract with Fabrizio & Martin?

- A I don't know.
- Q Isn't it a fact that this was something extra
 that was decided between the School Board and MacNamee,
 that the School Board needed this area as a play area and
 gave this to MacNamee as an extra?
- A My recollection is this has nothing to do with MacNamee, it has to do with Bradhurst.
 - O The borrow pit has to do with Bradhurst?

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- The play field you referred to. A
- Can you show me where Bradhurst is required to do that type of work?

Maybe this will assist you, Doctor. I show you a letter of May 19, 1966 from Macmamee to the Board of Education with respect to that same work referred to on Plaintiff's Exhibit 15.

- This indicates that Bradhurst would do the seeding of the play field and he has made a proposal of \$8700 to do some grading.
 - By "he" you mean MacNamee? Q
 - MacNamee .
- So MacNamee was to do the grading for \$8700 and Bradhurst was to do the seeding for the additional amount/ contained, the additional \$1500?
 - It appears that way, yes. A
- And this was not part of Fabrizio's original contract, was it?
 - I don't know. A
- I refer you to the next page, two pages of the same memo, which refer to \$2,000 correction of erosion and drainage problem and \$2300 for a five-foot high fence.

That five-foot high fence wasnot part of Fabrizio's contract, was it? was tobejet in Jule selected

Change orders to MacNamee.

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	0	1	believe	you	will	find	them	annexed	to	our	answers
to	inte	rro	gatories								

Fowler-cross

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Did you find it, Doctor?

It is on page 5 of Schedule 4.

A: That is a change order to the road contract.

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Powler-cross

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To the road contractor, all right. It has nothing to do with the two in question?

That is right.

But then there are no change orders that have been furnished to theplaintiff with respect to the other two contracts.

Are you contending that there was a change order to one of those contracts?

I need to refer to the MacNamee payment requisition.

Showing you Exhibits 87 through 89, I believe that is all of them, Doctor.

There must be some more from him. There are no others from MacNamee?

I didn't see any others. Q

Exhibit 86.

MR. YAVNER: Yes, it is the 86 series.

MR. POWERS: I am sorry, you are right.

This has refreshed my recollection.

Very good.

The contract that was in the guaranteed maximum of \$25,500 is that referred to in the billing as the general contract. The total cost of which amounted to \$19,928.50.

1	Qg gtg 2 Fowler-cross
2	Q Right.
3	A The set of bills entitled parking and curbing re-
4	lated to the parking and curbing contract which had a
5	\$62,500 but on which we paid \$62,046.
6	These other bills, 89% through F, was for work
7	within Fabrizio's and Martin's contract but not specifically
8	contracted for with MacNamee and outside the score of the
9	other contracts.
10	This was paid for on a cost plus basis.
11	Q How do you know that this work was not part of
12	Fabrixio & Martin's contract?
13	A The architect indicated that.
14	Q But yet no contract was entered into with MacNames
15	for this work?
16	A As I recall, it was just on his billing.
17	O We are talking about what, \$20,000?
18	A \$20,043.
19	Q Let me try and get something straight.
20	Is that \$8700 referred to previously over and
21	above those requisitions? That is, for the general
22	restoration of the borrow?
23	A That memo to which you refer was simply an esti-
24	mate of cost. That was not a bill.
25	Q Approximately \$8700?
AND RESIDENCE OF THE PARTY OF T	

Qg 3	Powler-cross	335
A	If what you are asking is where is that	
in thes	e bills, I don't know.	
Q	If it is in them at all, you don't know?	
Α	It could not have been paid out of any ot	her
things !	but from these bills.	
	THE COURT: Why don't we take a five-minut	e reces
at this		
	(Recess.)	
Q	Dr. Powler, I would like to refer you to	MacName
change o	order No. 1 which again is part of the answer	ers to
interrog	gatories.	
	Going down the list of items, the first is	tem for
a little	over \$2700 is extra walk pavement of 570	quare
yards, a	t so much a square yard.	
	Is this work that was provided for in the	ori-
ginal co	entract documents with Fabrizio & Martin?	
/A .	I don't know.	
Q	Is this an item that is being charged as p	art of
the comp	letion cost against Pabrizio & Martin?	
A	This is a change order. The charges are ba	sed on
the bill	ings and not on the change orders.	
Q	Is this amount being charged against Fabri	zio &

I don't know.

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		Fowler-cross	
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- Would the same be true as to the next two items which are all additional amounts to be added to the amount to be paid to MacNamee?
 - Yes.

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- So those two items, again, you don't know whether they are being charged against Fabrizio and Martin?
 - Correct.
- And you don't know whether they were part of the original contract with Fabrizio & Martin?
 - A That is correct.
- The next three items or rather the next two items are deduct items.

Do you know whether they were part of the original contract documents? Or the work provided for therein was part of the original contract documents?

I don't know. I can only assume on the first of the two items that MacNamee's men, one of his men must have cut the underground electric line and this is to pay for the cost of that work.

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Q So you don't know for sure, though?

A That's correct.

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- Turning to the next page, which is a change order one to Bradhurst which is an addition of \$2,000 to the Bradhurst contract, do you know whether the work as specified in this change order was work provided for in the original contract documents?
 - A No, I don't know.
 - Q ith Pabrizio and Martin, that is?
 - A No, I don't.
- O Do you know if this amount is being charged to Pabrizio and Martin?
 - A No, I don't.
- The next page is change order number two. That calls for an additional payment of \$1700 to Bradhurst. Are your answers the same for this change order as with respect to the previous change orders, that you do not know the answers to the questions?
 - A Correct.
- The next page is change order 3, which is an addition of approximately \$1700. Are your answers the same with respect to this change order as it was to the last two change orders?
 - A Yes, except what I read on the face of the change

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for furnishing labor and equipment which is described in the

letter of November 11, 1966, which is the following page.

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No. That is this document here.

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It was not in the original answers to interrogatories either in the \$174,000 sum or any sum, it just didn't appear at all, correct?

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That is correct.

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cation, could you explain what this item is?

A At the time that the completion contracts were let

Could you explain, I think you did, but for clarifi-

At the time that the completion contracts were let it became clear that the amount of the completion contracts fully paid would not be within the available resources that the School District had from its initial bond sale and so the Board of Education which had had voter approval to issue formerly \$50,000 worth of bonds but had chosen originally to issue only \$3,800,000 worth of bonds adopted a resolution authorizing the sale of \$250,000 in additional bonds and then authorized the issuance of bond anticipation notes because it was unclear as to whether this would simply be a temporary situation in which we would get the money back from the bonding company or the contractor or whether it would be a more long term matter.

But rather than commit us to long term interest costs on it we simply issued notes.

Then at a subsequent date bonds were actually sold.

The interest costs here reflect the interest on the bond anticipation notes during each of the five years in which they were
issued and then the interest costs proportionately on the bond
sale itself.

- Q Are these 30 year notes?
- A It was 25--notes?

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	Q	Yes.
	A	The notes are one year notes.
	Q	And what about the bonds?
	A	The bond issue was, as I recall it, a 25 or 26
year	one.	

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gtg 1 Fowler-cross 341 So in effect if I understand you correctly, the School Board is charging Pabrizio & Martin for 30 years of interest to borrow this \$250,000? A yes. Further, Doctor, is it your contention that the reason for requiring these \$250,000 in bonds was because of Pabrisio & Martin's alleged breach of its contract and that these moneys were required to complete the school, actual construction of the school? Principally, yes. I show you a memo from yourself to Anthony Sabello, dated April 24, 1967, and ask you if you were the athor of that memo? A Yes. MR. POWERS: May I have that marked as the next exhibit, please. (Plaintiff's Exhibit No. 16 received in evidence.) Referring to Plaintiff's Exhibit 16, Doctor, I refer you to page 2, down at the bottom, Item 2, referring to funds provided for furniture and equipment from

Do you see that item?

A Yes.

annual budgets.

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Powler- cross

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- This is for furniture and equipment, and furni-Q ture and equipment was not part of the Pabrizio & Martin contract, was it?
- There may have been certain built-in items of equipment in the Rabrisio & Martin contract.
- But for the large portion they were not part of his contract?
 - That's right.
 - He was not responsible for any desks or chairs? Q
 - Nothing moveable. A
 - 0 Right.

How much is allowed for furniture and equipment? How much was budgeted for furniture and equipment?

- At which point?
 - Let me withdraw that question if I may.

Referring to this Exhibit 16, you provide that for 1965 and 1966 you use \$74,000 plus for furniture and equipment or you allocated, I would assume that, is it not?

- Yes. It does not necessarily mean it was ex-It would appear that the annual budget for the school district 1965-1960 provided for \$74,298 for furniture and equipment.
 - Then for the year 1966-1967 it provided for \$65,000 0

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2	gtg 3	Fowler-cross	343
3	plus?		
	A	That is correct.	
4	0	Then there is an issue, bond	issue, \$214,000 plus.
5		Isn't that that same \$250,000	
6	just wer	e referring to that you are ch	
7		& Martin?	yang ugainst
8	A	There is nothing to indicate	
9			
10	0	Isn't that the fact, Doctor?	You prepared this
	memo.		
11	A	Well, there are two bond issue	es involved here.
12	Q	What bond issue is referred to	
13	A	As of 1967, there had only bee	
14	the three	million, eight hundred thousa	
15		The bond issue for the the s	
	the \$250	,000 did not occur until 1971.	
17	O	Isn't it a fact that the money	a obtained from
	the bond	issue and the warrants prior t	o the bond issue
9	were used	primarily for furniture and a	quipment?
0		What bond issue are you speaki	
2	0	The second, the \$250,000 bond	issue. You ori-
		aid that that bond issue did n	
3		e years after. You originally	
1	warrants,		
5	A	The bonds were not sold until for	ive years after the

	5a gtg 4 Powler - cross 344
	warrants began to be sold.
	Q Right. And from the sale of the warrants you
	got \$250,000,right?
	A That is correct.
7	Q And that was the predecessor to the case and
8	issue, correct, the warrants?
9	A That is correct.
10	Q What was that \$250,000 spent for primarily
11	it the furniture and equipment?
12	A Primarily for construction.
13	Q Are you saying it was not spent primarily for
14	furniture and equipment?
15	A It was spent primarily for the cost of completion.
16	O How much of it was spent for furniture and equip-
17	ment?
18	A I don't have those figures in front of me. I
19	would estimate at the most \$50,000.
20	Q Isn't this a case, Doctor, where you juggled .
21	from one account to another and you put whatever you
22	want in one account and take it out and put it in another
23	account and just what you are doing here?
24	A You are restricted in this case by law.
25	Furniture and equipment is the only item for school
	construction purposes that can be expended out of regular

5a gtg 5 Fowler-cross

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operating budgets.

Our school construction costs, our completion costs in this case, must have come out of the proceeds of the bond sale.

Q Yes.

Now, your original bond issue for the construction of the school included the moneys to be used for furniture and equipment, correct?

- A It included a budget allocation for that.
- Q It was supposed to, that is correct. How much? \$400,000, approximately?
 - A No.

Well, at what point?

- Q When the bond issue was issued.
- A The Board adopted a resolution for the 3.8 million and I believe in that the budgetary allocation was \$280,000 for furniture and equipment.
- Q And what was done with that \$280,000 during the course of construction? Wasn't that money used for the construction of the school?
 - A Yes, some of it was used for school construction.
 - Q A large portion of it, correct?
 - A I don't recall the figure.
 - O So, in effect, what you were doing was you were

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not using the moneys for furniture and equipment even 346 tough those moneys were allocated for furniture and equipment in the bond issue, you were using them for general construction?

The bond issue was for a lump sum. It did not provide a breakdown. We were permitted to use the funds in any way we saw fit and we changed the budget from time to time as the demands on certain costs exceeded their allocation by budget, but the Board had authority to spend up to \$4,050,000 to construct and equip the school.

And those moneys that were originally allocated for the furniture and equipment were, in effect, used for the construction of the school?

In terms simply of our internal bookkeeping.

But then when you come down to the notes for \$250,000, it no longer becomes an internal thing, then it is all charged to general construction, is that what you are saying?

The fact is we could not have constructed the school without having issued the \$250,000 in bonds. We could have paid for the equipment for the school out of operating costs, but we could not have paid for the construction of the school out of operating costs.

Then this is just a juggling of books? That is

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what you are saying, isn't it?

It is more than that. It is the Board's obligation under the law not to commingle the funds.

In preparing your breakdowns of allocation of Q the cost, did that figure that you had in there for furniture and equipment remain a constant figure or did it fluctuate?

- In terms of the budgeted amount?
- Q Yes.

As I recall, it fluctuated. There were various estimates of the cost of furnishing and equipping the school from what we would very much like at the very beginning to what was practical and affordable.

But it fluctuated without any furniture or equipment having been purchased, isn't that correct?

Furniture and equipment was purchased during the course of construction.

But I am saying there were times, meany times, when that figure that you had budgeted for furniture and equipment fluctuated even though no furniture and equipment had been purchased?

In terms of the bookkeeping, if that is what you are referring to.

0 Yes. gtg 8

Fowler-cross

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The accountant, when expenditures were made and if expenditures were made beyond what had been allocated on her account sheet, then she would take the funds so that the books balanced from another account sheet and very often she transferred funds out of the furniture and equipment section of her books to some other section of her books.

It was purely and simply a bookkeeping transaction.

- So you were using moneys that had been allocated for furniture and equipment for the actual construction of the school and not for furniture and equipment correct, in this juggling of books?
 - Allocated by the bookkeeper, yes.
 - 0 Yes.

Now I show you, Doctor, a capital fund accountant's report for December of 1965, and ask you if you can identify that, please.

A Yes.

MR. POWERS: May we have this marked as the next exhibit, please, in evidence.

(Plaintiff's Exhibit 17 received in evidence.)

Doctor, referring to Plaintiff's Exhibit 17, this is the accountant's report of budgetary balances for the month beginning December 1, 1965 and ending December

1	gtg 9 Fowler-cross 349
2	31, 1965.
3	This was while Fabrizio & Martin were still on
4	the job, isn't that correct?
5	A That is correct.
6	Q Fabrizio & Martin did not leave the job until
7	March of 1966?
8	A That is correct.
9	Q About three months later, correct?
10	A Yes.
11	Q With respect to the Middle School project, what
12	was the balance of funds remaining in connection with this
13	project as of December 31, 1965?
14	A The budget balance was \$105,140.48 in the red.
15	Q It was a deficit of \$105,000, correct?
16	A For budgetary purposes, yes.
17	Q For budgetary purposes and your budget was
18	based on what your bond issue was, correct, your original
19	bond issue?
20	A That is correct.
21	Q The amount of dollars you had to spend. And as of
2	December 13, 1965, you had spent \$105,000 more than you
3	had budgeted and allocable to that school project, isnt
4	that correct?

No.

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saying it is an invalid basis.

Fowler-cross

A What I have tried to point out to you is that the item of \$283,000 as shown here as committed and, therefore, reflected in the \$105,000 negative balance can, in effect, be interpreted as a contingency, because that furniture and equipment may be purchased out of other funds, so that amount of \$283,000 can be decreased by the amount of the original in construction costs because we can purchase the equipment elsewhere.

The actual cash position at the time and contractual position, that is, what we were obligated to pay, would have shown a plus balance of \$178,000.

O Yes. But, Doctor, as I understand it, when you see sought the original bond issue you anticipated including furniture and equipment in there and you did, in fact, include furniture and equipment in that bond issue, did you not?

A The vote was for a lump sum. It did not talk it down.

Q I am not talking about the vote, I am talking about what the School Board did. They allocated over \$200,000, close to \$300,000 of that 3.8 million dollars for furniture and equipment.

A In the initial budget breakdown, that is correct.

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3	Q	And they continued to keep that in there throughou
	the entir	e project, furniture and equipment?
4	A	Purniture and equipment, that's correct.
5	Q	Now, are you telling me just become

just because they can buy furniture and equipment out of some other funds that that has nothing to do now with the construction of the school?

I'm saying our costs of constructing the school must be taken out of the proceeds of the bond issue, they may not be taken out of other funds.

And just because the furniture and equipment can be 0 taken out of other funds, you, therefore, can eliminate that as the reason for needing the \$250,000 bond issue, is that what you are saying?

What I am saying is we could have constructed the school and paid all of the completion costs out of the original 3.8 million dollar bond issue if we had not incurred these extra contruction completion costs.

- Including the furniture and equipment? Q
- Not including the furniture and equipment.
- How do you get the money for the furniture and Q equipment?
 - Out of operating budgets. Λ
 - Where do you get your operating budget from?
 - It is voted on annually. A

1	gte 2	Fowler - cross 353
2	Q	So it depends on taxes that the people have to pay
3	as to wh	at your operating budget is?
4	A	That's correct. That's true of all of these items.
5	Q	So to make up for that two hundred plus thousand
6	dollars,	you have to increase the taxes of the taxpayers in
7	the dist	rict, correct? Either that or cut down on some other
8	services	you furnish?
9	A	You have to provide for it in the annual budget.
10	Q	And I recall what you testified to previously,
11	based on	the contracts that you had entered into, you only
12	had a co	ntingency of \$8,000 on a four million dollar project?
13	A	That's correct.
14	. 0	Could you explain to me, then, getting back to
15	Exhibit :	16, what this reference is to 214,847 next to the bond
16	issue?	
17	A	Of the total sum of \$355,000 to be spent for furni-
18	ture and	equipment, it indicates that \$214,000 will come out
19	of the p	roceeds of bond issue.
20	Q	But up above you have furniture and equipment for
21	\$283,000	as the budget at contract signing.
22	A	Yes.
23	Q	So you are saying \$214,000 is going to come out of
24	the origi	nal bond issue?
25	A	Rather than 283.

And this is in April 1967, when in December of 1965 you had a deficit of 105 already, so how could you get \$214,000 from the original bond issue when there wasn't that much in the bond issue in December of 1965 and here we are talking about April of 1967 when that figure was obviously higher, that \$105,000.

A The word bond issue refers to the aggregate bond issue, \$4,050,000. Three million eight plus \$250,000.

Q Wait a minute. You didn't have authority for \$4,050,000. Come on, let's stick--

A Yes, we did.

There was an agreement with the peoplein the town that you would not spend more than three million eight and you would go back to them if you required more money, isn't that so?

- A There was not an agreement. Members of the--
- Q Did the School Board go back to the voters to get that additional \$250,000 bond issue approved?

A No.

Q Could you show me the documents whereby that \$250,000 bond issue was approved, please?

A It is in a bond resolution addopted by the Board, but I don't believe the bond resolution is here.

Q And the taxpayers weren't consulted at all with